(37,569)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 26

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

COMMONWEALHTH OF VIRGINIA, at the Relation of H. G. SHIRLEY, Highway Commissioner, Appellee

PETITION FOR APPEAL

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Comes now Southern Railway Company, defendant below before the State Corporation Commission, and appellant here, and, feeling itself aggrieved by the judgment, order and decree herein rendered against it by the State Corporation Commission on the 8th day of March, 1932, respectfully petitions this Honorable Court for an appeal from said judgment, order and decree, and for reversal thereof, and, in support of its said petition for appeal, and of its said prayer for reversal, respectfully shows the Court:

Statement of the Case

The one controlling issue herein, determinative of the whole cause, is as to the constitutionality, under the due process clause of Article 1, section 11, of the Constitution of Virginia, and under the due process clause of the 14th Amendment to the Constitution of the United States, of the Act of the General Assembly of Virginia identified as Chapter 62, Acts 1930, approved February 27, 1930. The answer to that issue will answer all the subordinate questions raised by the assignments of error.

This issue was raised below by appellant's demurrer interposed to the complaint of appellee, complainant below. (R., 9.) It was argued and briefed by both parties. The [fol. 2] Corporation Commission called for reargument, which was had. After keeping the case under consideration from March 30, 1931, to March 8, 1932, the Commission

decided the issue against the contentions of appellant, held the statute to be constitutional, and overruled appellant's demurrer. (R., 15.) The Corporation Commission filed an elaborate opinion setting forth the grounds and reasoning upon which its holding was based. (R., 17.)

The appellant having elected to stand upon its demurrer and upon the legal position therein asserted, the Commission, in the same order and decree, entered a final order against appellant directing that it "do forthwith proceed to provide all equipment and material, and to construct, within its right of way, limits on State Highway Route No. 12, Project 460-E, over its tracks and rights of way at Antlers (Mecklenburg County), Virginia, an overhead crossing in accordance with the plans and specifications submitted by the State Highway Commissioner by communication dated January 7, 1931, to Southern Railway System, copy of which appears as Exhibit A with the complaint". (R., 6.)

In view of the announced intention of the appellant to appeal to this Court, the Corporation Commission suspended its final order without bond for 90 days, to allow this appeal. (R., 16.)

The Statute in Question

The sole support for the action of the complainant below, appellee here, the State Highway Commissioner, and the sole support for the final order of the Corporation Commission ordering appellant to comply with the requirement of the Highway Commissioner, by all of which appellant's property would be taken, is the said statute of Virginia, Chapter 62, Acts 1930, approved February 27, 1930, hereinafter referred to as the "Act of 1930", asserted by appellant to be unconstitutional and void for want of due process, but sustained as valid by the Corporation Commission. The said Act of 1930 is printed in full as Appendix A hereto. In so far as pertinent to the present controversy, it provides:

* * * Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead * * * crossing becomes, *in the opinion of the State Highway Commissioner,* necessary for public safety and con- [fol. 3] venience, * * * *the State Highway Commis-*

sioner shall notify in writing the railroad company * * * upon which the existing crossing at grade * * * is, * * * *stating particularly the point at which * * * the existing grade crossing is to be eliminated * * * and that the public safety or convenience requires* that the crossing be made * * * above * * * the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above * * * the tracks of said railroad, * * *, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein provided for leaves the ground line of the State road to go over * * * the tracks of the railroad, and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead * * * crossing,* * * * in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on. (Italics added.)

There follow, in the statute, provisions: (1) authorizing the railroad, if dissatisfied with the plans and specifications submitted by the State Highway Commissioner, to petition the State Corporation Commission, setting out its objections thereto, and recommending plans and specifications in lieu thereof, and authorizing the Commission to hear the complaint, solely as to the plans and specifications, and to approve those submitted by the Highway Commissioner, or others in lieu thereof; (2) undertaking to make it the railroad's duty, in such event, to furnish materials and construct in accordance with the plans and specifications approved by the Corporation Commission; and (3) purporting to impose on the railroad one-half the total cost of the work done both by it within, and by the Highway Commissioner without, the right of way limits, and the obligation to maintain the portion within the right of way lines, except the surface of the roadway.

The statute contains no provision requiring the Highway Commissioner to give the railroad company notice or to al- [fol. 4] low it a hearing before he makes his finding and determination that public safety and convenience require the elimination of the grade crossing and the substitution of the overhead crossing at the expense, in part, of the railroad. It lays down no rule of law, sets no standard, as to when public safety and convenience may be determined to require such construction. It does not require the Highway Commissioner to take or consider evidence, to hold a hearing, to give the railroad opportunity to object or to be heard in opposition. It provides for no semblance of primary, procedural due process of law. It undertakes to confer on the Highway Commissioner, an administrative official, uncontrolled and arbitrary power to make a determination and requirement which will take the railroad's property, without notice, without right to contest, without hearing, without evidence, merely upon his ex parte formulation of his personal opinion.

Moreover, there is no provision in the statute for appeal from the determination and requirement made by the Highway Commissioner or for a judicial review in any forum of the merits of his finding that public safety and convenience require the overhead crossing to be provided. This is admitted, and it was further admitted, both by appellee below and by the Corporation Commission in its opinion (R., 26), that there is no provision in the statute law of Virginia for such judicial review. The Act of 1930 undertakes to confer on the Highway Commissioner the power to take the railroad's property by an arbitrary exercise of personal and uncontrolled discretion, based solely on ex parte formulation of his personal opinion, without notice, without hearing, and to make that exercise of discretion final and unappealable and subject to no judicial review.

The question arises on the face of the statute whether, under "a government of laws and not of men" such power can be conferred upon an administrative officer, consistently with due process.

The Action of the Highway Commissioner under the Assailed Statute

It will be noticed that the only steps the statute requires the Highway Commissioner to take, in order to create and

perfect the supposed legal "duty" of the railroad to furnish materials and construct, are:

First. That he form his ex parte opinion that public safety and convenience require the construction;

[fol. 5] Second. After his opinion is formed, that he notify the railroad in writing, stating where the construction is required to be made, and notifying of his determination that public safety and convenience require it;

Third. That he submit plans and specifications for the work.

Acting solely under the supposed authority of this statuate, H. G. Shirley, the relator complainant below, as State Highway Commissioner of Virginia, without giving the appellant notice and without affording it opportunity to be heard, pursuant to no sort of legal procedure, and acting merely in the form of his own mind, conscience, and discretion, arrived at the opinion that public safety and convenience required the elimination of an existing grade crossing of State Highway Route 12 with appellant's railroad near Antlers, Mecklenburg County, Virginia, and the substitution in lieu thereof of an overhead highway crossing over the tracks.

Having formed that opinion, ex parte, he then gave appellant notice in writing, dated January 7, 1931, of the opinion he had already formed and the determination he had already made in his own mind, with which notice he submitted plans and specifications for the work, and in which notice he called upon appellant to "proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted, within the right of way limits." (R., 7.)

Appellant replied to the notice by letter dated January 20, 1931 (R., 8), in which it said that it did not agree with the Highway Commissioner's opinion that the public safety and convenience required the elimination of said grade crossing and the building of an overpass over the tracks, and asserted its opinion that the Act of 1930 is unconstitutional and void. It advised that, "therefore, unless and until it should be finally determined by the courts that it is a valid statute, this Company cannot recognize that it is under any legal duty to

provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

The Proceeding Below Before the State Corporation Commission

The Act of 1930, while undertaking to make the Highway Commissioner's ex parte determination final and unreview-[fol. 6] able, and to create, perfect, and finally impose upon the railroad a legal duty to comply with the Highway Commissioner's requirement, did not arm that official with any machinery to enforce his requirement or to compel obedience thereof and the performance of its supposed duty by the railroad company.

Accordingly, after the receipt by the Highway Commissioner of appellant's letter of January 20, 1931, refusing to obey his requirement upon assertion of the unconstitutionality of the statute, he filed a complaint against appellant before the Corporation Commission to compel the performance by appellant of the supposed duty imposed upon it by the acts of the Highway Commissioner under the Act of 1930. (R., 2.) This complaint invoked the Corporation Commission's constitutional and statutory powers to compel railroads to perform duties imposed by law.

Manifestly, if the Act of 1930 is unconstitutional, then no duty has been imposed by law upon appellant and the Corporation Commission has no power to require it to comply with the requirement of the Highway Commissioner.

The issue was drawn by appellant's demurrer to the Highway Commissioner's complaint. (R., 9.)

The complaint (R., 2), in addition to formal and immaterial allegations, alleged that the Highway Commissioner, acting under the Act of 1930, had, in his official capacity, ascertained and determined that the grade crossing should be eliminated and the overpass substituted and that this was necessary for the public safety and convenience; that he had given the notice required by the Act, attaching a copy of the notice of January 7, 1931, as Exhibit A; that he had submitted plans and specifications for the work; that it thereupon became, was and still is the duty of Southern Railway Company to provide all the materials and equipment and to construct the overpass in accordance with said plans and specifications and as directed

by said notice; that Southern had failed and refused to obey said duty and to furnish equipment and materials and to construct, asserting the claim of unconstitutionality of the statute (copy of appellant's letter of January 20, 1931, being attached as Exhibit B); that the cost of the work when done would be divided half and half between the Commonwealth and the railroad as provided by the Act; that the Corporation Commission had constitutional and statutory jurisdiction to receive the complaint, to ascertain and determine whether or not Southern had failed or refused or was failing to comply with its said duty, to compel it to [fol. 7] perform the duty, and to impose fine or fines and otherwise enforce the performance by it of its said duty.

The appellant demurred to the said complaint for that the complaint did not state a cause of action, upon grounds specified in detail in the demurrer (R., 9) and which we summarize as follows:

1. The Act of 1930, upon which the complaint is grounded is unconstitutional and void, in that:

a. It undertakes to delegate to an individual administrative officer an arbitrary power to make a regulation taking demurrant's property, without providing for, or granting to demurrant the right to, essential procedural due process of law, that is, the right to notice and hearing prior to the making of said regulation or requirement, thereby denying demurrant due process of law and taking its property without due process of law in violation of Article 1, Section 11, of the Constitution of Virginia, and of the due process clause of the 14th Amendment to the Constitution of the United States.

b. It undertakes to impose on demurrant a legal duty to devote and expend its property for the overhead bridge, based on no competent legislative or judicial finding arrived at with due process of law and after notice and hearing, but based solely upon an ex parte opinion of the Highway Commissioner, arrived at without notice and hearing, upon reasons known only to him, and based upon no legal evidence or requirement to take or consider evidence, in violation of the same two constitutional provisions.

2. The acts of the Highway Commissioner, the determination made by him, and the requirement undertaken by

him to be imposed on demurrant, under said unconstitutional statute, are purely arbitrary, null and void, without authority of law.

3. The complaint does not state facts sufficient to state a cause of action in that it does not show that the determination and requirement of the Highway Commissioner were made after notice and hearing as matter of right, but shows, on the contrary, that they were made without primary due process of law and hence without authority of law, arbitrarily and based solely upon an ex parte personal opinion, in violation of the same constitutional provisions.

[fol. 8] 4. The said determination and requirement, made without due process of law as alleged, are wholly insufficient to impose any legal duty on demurrant to furnish equipment and materials and to construct, and the complaint fails to state facts sufficient to show that such legal duty has been validly imposed on demurrant.

5. The complaint fails to state facts sufficient to show that demurrant failed to refused or fails or refuses to perform any constitutional or legal duty imposed upon it by due process of law.

6. The Corporation Commission is without jurisdiction or power to grant the prayer of the complaint to enforce compliance with the requirement which demurrant is under no legal or constitutional duty to obey and to grant the prayer would take demurrant's property without due process of law, in violation of the said constitutional provisions.

The Corporation Commission heard the cause upon complaint and demurrer, and upon briefs, oral argument, and reargument.

There was no issue of fact before the Commission. It had for decision only the squarely-raised legal issue as to the constitutionality of the Act of 1930, the validity of the acts of the Highway Commissioner thereunder, whether any legal duty had been imposed on demurrant to obey his requirement, whether the complaint stated a cause of action, and whether the Commission could constitutionally enforce obedience of the unconstitutional requirement.

The Decision of the Corporation Commission

It will be noted that the demurrer raised no question of the substantive police power of the State. Admittedly the State has the substantive police power to make reasonable requirements enforcing uncompensated obedience by railroads to promote public safety and convenience, as by contributing their own property to the construction of grade crossing elimination structures reasonably necessary to protect the public. Admittedly the states have the substantive power, subject to the restrictions of the constitutions and of Federal law, as Mr. Justice Holmes said in Erie Railway Co. vs. Public Utility Commissioners, 254 U. S. [fol. 9] 394, 65 L. Ed. 322, to "be so foolish as to kill the goose that lays golden eggs for them". But they must follow primary, procedural due process of law in doing so. The goose may not be killed without notice and hearing, without right to contest and plead for its life. It may not be killed by ex parte fiat or ukase of an administrative official, made in his own arbitrary discretion, final and irrevocable in its nature and subject to no appeal or judicial review on the merits.

It is the theory of the demurrer that this cannot be done under the Constitution of Virginia and under the 14th Amendment to the Federal Constitution. It is the theory of the complaint that it can. And the Corporation Commission sustained the theory of the complaint and overruled the demurrer. The issue could not be more clearly drawn.

The Commission below, while recognizing that the due process clauses require provision in the law itself for notice and hearing as matter of right before private property can be taken by order or requirement of an administrative officer, and in addition require that even then there must be in the law provision for judicial review on the merits, as applied to all branches of the state's power except its so-called police power, yet adopted in whole the strange theory of appellee that so long as the state is acting under the police power it may constitutionally deprive a railroad of its property without procedural due process, may delegate to an administrative officer the arbitrary and uncontrolled power to make a requirement or regulation, without notice and hearing, final and irrevocable in its effect, subject to no judicial review, and having effect to take the

private property of a railroad for public purposes without compensation.

This is merely to hold that, unlike the state's power to tax, unlike its power to condemn, unlike its power to assess for local improvements, unlike all of its other sovereign powers, its so-called police power is unlimited by any constitutional provision for procedural due process. It is to hold that purely personal and arbitrary power may be conferred on an administrative officer, if within the indefinite realm of the police power.

Assignments of Error

Appellant hereby assigns for error that the Corporation Commission erred, in that:

[fol. 10] **Assignment No. 1**

It held that Chapter 62, Acts 1930, is valid and constitutional and not violative of the due process clause of Article 1, section 11, of the Constitution of Virginia.

Assignment No. 2

It held that Chapter 62, Acts 1930, is valid and constitutional and not violative of the due process clause of the 14th Amendment to the Constitution of the United States.

Assignment No. 3

It failed and refused to hold that Chapter 62, Acts 1930, is unconstitutional and void, and violates the due process clauses of Article 1, section 11, of the Constitution of Virginia, and of the 14th Amendment to the Constitution of the United States, in that it makes no provision requiring notice and hearing before the determination and requirement by the Highway Commissioner becomes final and irrevocable, and makes no provision, and no law of the State of Virginia does make provision, for judicial review on the merits of the Highway Commissioner's determination that public safety and convenience require the elimination of a grade crossing and the substitution of a grade separation structure at the expense of appellant, in part.

Assignment No. 4

It failed and refused to hold that said Act is unconstitutional and void, under Article 1, section 11, of the Constitution of Virginia, and under the 14th Amendment to the Constitution of the United States, as denying primary proceedural due process of law, in that it undertakes to delegate to an administrative official the uncontrolled and purely arbitrary power to make a determination, finding and requirement, taking appellant's property without notice and hearing, based upon no evidence, controlled by no legislative standard, based only upon an arbitrary, ex parte, personal opinion of the official, and in that it undertakes to make the exercise of that arbitrary power by the official final and irrevocable and subject to no appeal or judicial review.

[fols. 11-55] Assignment No. 5

It failed and refused to hold that the acts of the State Highway Commissioner under said unconstitutional statute are null and void, imposed no legal duty upon, and are of no legal and binding effect on, appellant.

"Here followed, in accordance with the State practice on appeal from the Corporation Commission to the Supreme Court of Appeals of Virginia, in the body of the petition for appeal, a brief and argument supporting the petition, occupying 45 printed pages in the printed record below—omitted in printing."

[fol. 56] Conclusion

Appellant respectfully submits, therefore, that the Act of 1930 is unconstitutional and invalid, for the reasons heretofore stated, that the opinion, determination and requirement made thereunder by the State Highway Commissioner are nullities and impose no legal duty of compliance on appellant, that it has failed to perform no duty, that the complaint does not state a cause of action, that appellant's demurrer thereto should have been sustained; that the decision of the State Corporation Commission should be reversed and the complaint dismissed, that a supersedeas be

awarded appellant, and that this Honorable Court should enter final judgment in favor of appellant under the statute in such cases made and provided.

Southern Railway Company, Petitioner-Appellant,
by Thomas B. Gay, S. R. Prince, Sidney S. Alderman, Its Attorneys.

I, Thomas B. Gay, an attorney at law duly qualified and practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order and decree complained of in the foregoing petition should be reviewed and reversed by this Court.

Given under my hand this 2nd day of June, 1932.

Thomas B. Gay.

June 2, 1932.

Appeal and supersedeas granted. Bond $1,000.00.

Louis S. Epes.

Received June 2, 1932.

H. S. J.

[fol. 57] APPENDIX "A" TO PETITION FOR APPEAL

Chapter 62, Acts of Assembly, Virginia, 1930, Approved February 27, 1930 (Virginia Code of 1930, Sec. 3974a)

Chap. 62.—An act to amend and re-enact an act entitled "An act to amend and re-enact an act entitled an act to provide for the construction of overhead and underpass crossings of railroads by State highways, and for the elimination of existing grade crossings on State highways, and to provide for the payment of the costs thereof, approved March 7, 1924, approved March 19, 1926"

Approved February 27, 1930

1. Be it enacted by the general assembly of Virginia, That an act entitled "An act to amend and re-enact an act entitled an act to provide for the construction of overhead and underpass crossings of railroads by State highways, and for the elimination of existing grade crossings on State highways, and to provide for the payment of the cost

thereof, approved March seventh, nineteen hundred and twenty-four, approved March nineteenth, nineteen hundred and twenty six") be amended and re-enacted so as to read as follows:

Section 1. Whenever a new State road is projected across a railroad, or an existing State road is to be so changed as to cross a railroad, and the State highway commissioner shall be of the opinion that the public safety or convenience at such crossing requires that the State road shall cross the railroad above or beneath the tracks of the said railroad, or whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution thereof of an overhead or an underpass crossing becomes, in the opinion of the State highway commissioner, necessary for the public safety or convenience, or whenever, in the opinion of the State highway commissioner, the public safety and convenience requires that an overhead or underpass crossing of a railroad and a State highway shall be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, the State highway commissioner shall nofify in writing the railroad company whose track is to be crossed or upon which the existing crossing at grade, or the overhead, or underpass crossing is, as the case may be, stating particularly the point at which the crossing is desired or the existing grade crossing [fol. 58] is to be eliminated, or the overhead or underpass is to be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, as the case may be, and that the public safety or convenience requires that the crossing be made either above or beneath the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished and a crossing constructed above or beneath the tracks of said railroad, or that the overhead or underpass crossing be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure be provided in lieu thereof, as the case may be, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein pro-

vided for leaves the ground line of the State road to go over or under, as the case may be, the tracks of the railroad, and to include all work and structures between said points. It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead or underpass crossing, or widen, strengthen, remodel, redesign, relocate or replace the overhead or underpass crossing, or provide a new or improved structures in lieu thereof, as the case may be, in accordance with the plans and specifications submitted by the State highway commissioner, within its right of way limits and the State highway commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on between the State highway commissioner and the railroad company; provided, however, that if the railroad company be not satisfied with the plans and specifications submitted by the State highway commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the State highway commissioner be unable in the meantime to agree on plans and specifications, including the grade of the approaches and the point to which the liability of the railroad shall extend, file a petition with the State corporation commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the State highway commissioner, or other plans in lieu thereof; and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, [fol. 59] remodel, redesign, relocate or replace, as the case may be, the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, within its right of way limits, and the State highway commissioner the portion outside of the railroad right of way, unless otherwise mutually agreed upon, in accordance with the plans and specifications approved by the State corporation commission.

Upon completion of the work, including roadway, approaches, drains and ditches and structures, in accordance with the plans and specifications, the railroad company

shall file with the State highway commissioner an itemized statement of the cost of the work done by such company, certified by an executive officer of such company, and the State highway commissioner shall file with the railroad company an itemized statement of the cost of the work done by him, if any, exclusive in each instance of the cost of right of way, and if the cost of the work done by the railroad company exceeds one-half of the total cost of the work done by the railroad company and the State highway commissioner, and provided the estimated cost of the entire work shall have first been approved by the State highway commissioner, the Commonwealth shall be obliged to pay for the railroad company, within thirty days, the amount of such excess paid by the railroad company. If the cost of the work done by the State highway commissioner exceeds one-half of such total cost, then the railroad company shall, within thirty days, pay to the Commonwealth the amount of such excess, such amount to be paid into the State treasury to the credit of the State highway system construction funds. All costs for which the State is responsible under this act shall be paid out of funds available for the construction of roads in the State highway system.

After such work has been done, the railroad company shall maintain the portion within the right of way lines, except the surface of the roadway.

[Caption omitted]

[fol. 60] BEFORE STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, State Highway Commissioner, Complainant,

vs.

SOUTHERN RAILWAY COMPANY, Defendant

COMPLAINT—Filed Feb. 18, 1931

To the State Corporation Commission of Virginia sitting at Richmond:

The Commonwealth of Virginia, at the relation of H. G. Shirley, State Highway Commissioner, complains of the Southern Railway Company, a corporation as follows:

(1) The undersigned relator is the State Highway Commissioner of Virginia and vested with authority and charged with duties as provided by law. The Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia and is a Public Service and Transportation Corporation engaged in transportation and railroad business, and as such owning and/or operating lines of railroad in the State of Virginia and elsewhere, and particularly a line of railroad in Mecklenburg County, Virginia, at or near Antlers in said County, whereon is located the grade crossing hereinafter mentioned.

(2) The undersigned relator pursuant to the powers vested in him and duties imposed upon him by law, and particularly pursuant to the provisions of an act of the General Assembly of Virginia approved February 27, 1930, identified as Chapter 62, Acts 1930, amending and re-enacting previously existing acts of the same and similar pur- [fol. 61] port, has in his official capacity ascertained and determined that the existing crossing at grade of State Highway Route 12, Project 460-E, by the railroad owned and/or operated by the Southern Railway Company near Antlers, Mecklenburg County, Virginia, should be eliminated and an overhead crossing substituted therefor, and that the elimination of such existing crossing at grade and the substitution therefor of an overhead crossing is necessary for the public safety and convenience, and pursuant thereto, notified in writing the said Southern Railway Company stating particularly the point at which the existing grade crossing is to be eliminated and that the public safety and convenience required that the said existing grade crossing be eliminated and a crossing above the tracks of the said railroad constructed. A copy of the said notice in writing dated January 7, 1931, is herewith filed as a part of this complaint marked Exhibit "A".

(3) The elimination of the said crossing at grade and the substitution therefor of an overhead crossing had been for sometime a subject of negotiation between your relator in his official capacity and the said railroad company, and the said railroad company had pursuant to and in the course of such negotiations prepared and submitted to your relator plans for the said work which were approved by your

relator. In compliance with the aforesaid act of the General Assembly of Virginia, your relator under date of January 7th, 1931, submitted to the said Southern Railway Company plans and specifications of the proposed work, they being the same as theretofore submitted by the said railroad company and approved by your relator.

(4) It thereupon became and was and still is the duty of the Southern Railway Company to provide all the equipment and materials and construct the overhead crossing in accordance with the plans and specifications submitted by your relator within the right of way limits of the railroad company and as set out in notification from your relator to the said company, under date of January 7, 1931, your relator called upon the said railroad company to proceed with the performance of the duty imposed upon it by law as aforesaid which said duty is a public duty.

(5) Notwithstanding its public duty, as aforesaid, the said Southern Railway Company has failed and refused to comply therewith and to provide the equipment and ma- [fol. 62] terials and to construct the overhead crossing within its right of way limits in accordance with the plans and specifications submitted by your relator. Your relator files herewith as a part of this complaint as Exhibit "B" a copy of letter of January 20th, 1931, from H. W. Miller, Vice-President of the Southern Railway Company, from which it will be observed that the said company does not recognize the duty imposed upon it by law, claiming the aforesaid act of the General Assembly of Virginia is unconstitutional and void.

(6) Your relator alleges that in his official capacity he has complied with all the requirements of law, particularly with all the requirements of the aforesaid Chapter 62 of the Acts of the General Assembly of Virginia of 1930, and that it is the public duty of the said Southern Railway Company to comply with the terms thereof and provided the equipment and materials and construct the overhead crossing within its right of way limits in accordance with the plans and specifications submitted by your relator under date of January 7, 1931, as hereinbefore alleged.

(7) Your relator further alleges that upon completion of the work, including that part thereof required to be done

by the Southern Railway Company, and the part thereof required to be done by your relator under the provisions of the aforesaid Act, the cost of the said work, exclusive of any cost of right of way should be divided between and borne by the Southern Railway Company and the Commonwealth of Virginia in equal parts under the terms and provisions of the aforesaid act of the General Assembly of Virginia, provided the said Southern Railway Company shall have complied with the provisions of said act.

(8) Your relator is advised and believes and therefore alleges that under the constitution and statutes of the Commonwealth of Virginia, the State Corporation Commission is vested with the power and charged with the duty of receiving this complaint and ascertaining and determining whether or not the Southern Railway Company has failed and refused, or is failing to comply with the aforesaid duty imposed upon it by law, and of compelling the said Southern Railway Company to perform and discharge the aforesaid public duty imposed upon it as a public service corporation, transportation company and railroad company, under the laws of the State of Virginia, and imposing proper fine or fines upon the said Southern Railway Com-
[fol. 63] pany and/or otherwise enforcing the performance by the said company of its duties.

In consideration whereof, your relator files this complaint against the Southern Railway Company and asks that proper notices be given and processes served upon the Southern Railway Company and that it properly be made defendant to this complaint, and that the said Southern Railway Company be required to perform the duties imposed upon it under the terms and provisions of Chapter 62, Acts of the General Assembly of Virginia, 1930, and to provide all equipment and materials and construct the overhead crossing within its right of way limits in accordance with the plans and specifications submitted by your relator as aforesaid and that all such further orders may be entered herein as the nature of the case may require.

H. G. Shirley, State Highway Commissioner, Relator. J. F. Hall, Attorney for Relator, Richmond, Va.

Duly sworn to by H. G. Shirley. Jurat omitted in printing.

EXHIBIT "A" TO COMPLAINT

January 7th, 1931.

Southern Railway System, general offices #1300 Pennsylvania Avenue, Washington, D. C.

[fol. 64] Attention Mr. J. B. Akers, Vice-President

Gentlemen:

Subject: Overhead Highway Bridge near Antlers, Virginia, M. P. AD-125.92, State Highway Route 12, Project 460-E.

Pursuant to the provisions of Chapter 62, Acts of the General Assembly of Virginia, 1930, and following up the correspondence with reference to this matter, I am writing to notify your Company that in my opinion the public safety and convenience requires that the present grade crossing, located near Antlers, Mecklenburg County, Virginia, Mile Post A. D. 125.92, State Highway Route 12, Project 460-E, be eliminated and that the crossing be made above the tracks of your Company at a point located approximately 432 feet east of Mile Post No. 126.

I am submitting herewith plans and specifications of the proposed work.

The plans for this particular overhead were prepared by you and submitted to me for approval and were approved by me, these plans being designated as drawing No. 4091, dated November 22nd, 1928. For your information I am also enclosing a copy of Sheet No. 8 of the plans for State Highway Project 460-E, Route 12, revised December 11th, 1928.

I call your attention to the provisions of the above mentioned Act of the General Assembly of Virginia and to the duties imposed upon your Company therein.

I am giving this notice so that you may proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted within the right of way limits of Your Company as required by law.

Will you please acknowledge receipt of this notice?

Very truly yours, —— ——, State Highway Commissioner of Virginia.

[fol. 65] EXHIBIT "B" TO COMPLAINT

Southern Railway System, Office of Vice-President in Charge of Operation

H. W. Miller, Vice-President

Washington, D. C., January 20th, 1931.

Mr. H. G. Shirley, Commissioner, Department of Highways, Commonwealth of Virginia, Richmond, Virginia.

DEAR MR. SHIRLEY: Your letter of January 7, 1931, with enclosures, addressed to Southern Railway System, attention Mr. J. B. Akers, has been referred to me.

Southern Railway Company does not agree with your opinion as expressed in that letter, that the public safety and convenience requires that the present grade crossing near Antlers be eliminated, and that an overhead crossing be built above the tracks. As I wrote you on December 27, 1930, it is further our opinion that Chapter 62, Acts of the General Assembly of Virginia, 1930, is an unconstitutional and void enactment. Therefore, unless and until it should be finally determined by the courts that it is a valid statute, this company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th.

Very truly yours, (Signed) H. W. Miller, Vice-President.

BEFORE STATE CORPORATION COMMISSION

[Title omitted]

[fol. 66] DEMURRER—Filed Feb. 18, 1931

Comes now Southern Railway Company, defendant in the above entitled proceeding, and demurs to the complaint herein for that it does not state facts sufficient to constitute a cause of action, in that:

1. The act of the General Assembly of Virginia approved February 27, 1930, identified as Chapter 62, Acts 1930, upon

which the complaint is grounded, is unconstitutional, null and void, and is of no valid or binding force and effect, in that;

a. It undertakes to delegate to an individual adminstrative officer, the State Highway Commissioner, an arbitrary legislative power to make regulations taking the private property of railroads, and to-wit, as sought to be applied and enforced in this case, an arbitrary power to make a regulation requiring this defendant to provide materials and to construct within the limits of its right of way an overhead bridge crossing of a state highway and defendant's railroad and right of way, at the point described in and in accordance with the plans and specifications submitted to this defendant by said State Highway Commissioner, all as alleged in the complaint, and to contribute its property thereto by bearing a portion of the expense thereof, without providing for, or granting to this defendant the right to, essential procedural due process of law, that is the right to notice and hearing as to the reasonableness, constitutionality and legality of such requirement, at any time prior to the making of such requirement, whereby said act, relied upon in the complaint in this proceeding and here attempted to be applied to and enforced against this defendant, denies to this defendant due process of law and deprives this defendant of its property without due process of law in violation of the due process clause of Article 1, section 11, of the Constitution of the State of Virginia, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

b. It undertakes to impose upon this defendant a duty to provide materials and construct said overhead bridge within the limits of the right of way, and to pay one-half of the cost of the whole overhead bridge as provided in said act, based upon no competent legislative or judicial finding arrived at with due process of law and after due notice to this defendant and right to hearing as to the [fol. 67] validity thereof, but based solely upon an opinion of said State Highway Commissioner arrived at ex parte, without notice or hearing or right to notice or hearing, and arrived at upon reasons known only to him, subject to no requirement that he take or consider any legal evidence, thereby denying to this defendant due process of law and

taking its property without due process of law in violation of the due process clause of Article 1, section 11, of the Constitution of Virginia, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

2. The acts done by the relator, State Highway Commissioner, the determination made by him, and the requirement undertaken by him to be imposed upon this defendant, as alleged in the complaint, were and are purely arbitrary, null, void, and without any authority of law, in that no authority in law was or is conferred upon him to do such acts, or to make such determination or requirement, and in that the sole pretended basis for such acts, determination and requirement, is the said null and void and unconstitutional Chapter 62, Acts of 1930, which denies to this defendant due process of law and undertakes to deprive it of its property without due process of law, as hereinbefore alleged, in violation of the due process clause of Article 1, Section 11, of the Constitution of Virginia, and in violation of the due process clause of the 14th Amendment to the constitution of the United States.

3. The complaint does not state sufficient facts to show that the said determination by the State Highway Commissioner was arrived at, or that the said requirement by him sought to be imposed on this defendant was made, with due process of law, or after any notice to or right to notice to this defendant, or after any hearing or right to hearing in accordance with requisite due process of law granted or secured to this defendant, or pursuant to any procedure or due process of law known to the law of the land, or pursuant to any valid authority of law; but on the contrary the said complaint shows that said determination arrived at and said requirement undertaken to be imposed upon this defendant by the relator, State Highway Commissioner, were purely arbitrary, arrived at and made without primary due process of law, without prior notice and hearing to this defendant, and based solely upon an ex parte opinion of said relator formulated without due process of law as to this defendant and under no valid authority of law, and that said determination and requirement accord-
[fol. 68] ingly deny this defendant due process of law, in violation of the due process clause of Article 1, Section 11

of the Constitution of Virginia and of the due process clause of the 14th Amendment to the Constitution of the United States.

4. The said determination and requirement, arrived at, made and directed against this defendant by the relator, State Highway Commissioner, without any valid authority in law, and with denial to this defendant of essential due process of law, as hereinbefore alleged were and are wholly insufficient to impose any legal duty on this defendant to provide materials, or to construct, or to pay any part of the costs of construction, pursuant to and in accordance with said requirement and the plans and specifications submitted to this defendant by said relator, and the complaint fails to state sufficient to show that any such duty has been constitutionally or lawfully imposed upon this defendant.

5. The complaint fails to state sufficient to show that this defendant failed or refused or fails or refuses to perform any constitutional or lawful duty, or any duty imposed by, and with due process of, law.

6. This Honorable Commission is without jurisdiction or power, under the constitution and laws of Virginia, to grant the relief prayed in the complaint and to enter an order requiring, or to require, defendant to carry out and comply with the said unlawful and unconstitutional and arbitrary requirement attempted to be imposed upon and directed against it by said relator, without due process of law, and without constitutional and unlawful authority, or to fine or otherwise penalize defendant for refusing to comply with or carry out said unconstitutional, unlawful, arbitrary and void requirement of the relator, and for this Honorable Commission to enter and undertake to enforce any such order as prayed in the complaint would deny to defendant due process of law and deprive defendant of its property without due process of law, in violation of the said Article 1, Section 11, of the Constitution of Virginia, and in violation of said 14th Amendment to the Constitution of the United States.

Southern Railway Company, by Thomas B. Gay,
Sidney S. Alderman, Attorneys.

[fol. 69] BEFORE STATE CORPORATION COMMISSION

[Title omitted]

ORDER FILING COMPLAINT, ETC.—Feb. 18, 1931

Complaint having been made to the State Corporation Commission by H. G. Shirley, State Highway Commissioner, alleging that the Southern Railway Company has refused to provide the equipment and materials and to construct an overhead crossing to eliminate an existing crossing at grade over the line of its railway on State Highway Route 12, Project 460-E, near Antlers, Mecklenburg County, Virginia, in accordance with the plans and specifications submitted by complainant to said defendant in violation of the provisions of an act of the General Assembly of Virginia approved February 27, 1930, identified as Chapter 62, Acts 1930, and in violation of its public duty;

It is ordered that the complaint be, and it is hereby filed and docketed, and that the Southern Railway Company appear before the State Corporation Commission in its court room at Richmond, on Monday, March 30, 1931, at 10:00 o'clock A. M., when the Commission will investigate and consider all evidence presented relative to such complaint, and will enter and issue such orders and afford such relief as in its judgment may be proper;

It is further ordered that a copy of this order, together with a copy of the aforesaid complaint, be served upon the Southern Railway Company.

BEFORE STATE CORPORATION COMMISSION

Case No. 4469

COMMONWEALTH OF VIRGINIA at the Relation of H. G. SHIRLEY, State Highway Commissioner,

vs.

SOUTHERN RAILWAY COMPANY

JUDGMENT—March 8, 1932

[fol. 70] This matter, which came on for hearing initially on March 30, 1931, in pursuance of order herein entered

February 18, 1931, and, having been from time to time continued, was fully heard and taken under advisement, and now comes, on this 8th day of March, 1932, to be heard and considered, upon the complaint of H. G. Shirley, State Highway Commissioner, relator, and exhibits filed therewith, upon the demurrer filed on behalf of Southern Railway Company, upon argument of counsel both orally and by briefs, and upon re-argument, the full Commission sitting;

Upon consideration whereof, the State Corporation Commission is of the opinion, for reasons stated in writing, by Fletcher, Commissioner, hereby made a part of the record in this matter, that the provisions of the law under which the State Highway Commissioner acted, as referred to and set forth in the opinion by Fletcher, Commissioner, are not in contravention of any provision of the State or Federal Constitution or any amendment thereof, and that, therefore, upon action of the State Highway Commission thereunder, a public duty arose on the part of Southern Railway Company to construct the overhead crossing at Antlers, Virginia, where State Highway Route No. 12, Project 460-E, crosses the right-of-way and tracks of the Southern Railway Company, in accordance with specifications and directions of the State Highway Commissioner, in the absence of modification of such plan and specifications by the State Corporation Commission according to law, and that the State Corporation Commission has jurisdiction to enforce compliance with such requirements and the performance of such public duty, and, therefore, that the demurrer of Southern Railway Company should be overruled, and that Southern Railway Company should be afforded an opportunity to answer, and in default of filing of such answer, or upon indication that it does not desire to file an answer, an order should be entered directing Southern Railway Company to construct an overhead crossing at Antlers in accordance with specifications as prescribed by the State Highway Commissioner and in accordance with the requirements of law, and, it having been indicated by counsel that Southern Railway Company does not desire to file an answer, but elects to rely upon the sufficiency in law of its demurrer to the complaint filed against it in this proceeding;

[fol. 71] It is adjudged, ordered, and decreed that the demurrer herein be, and it hereby is, overruled, and that Southern Railway Company, having indicated that it did not desire to file an answer, but electing to rely upon the sufficiency in law of its demurrer to the complaint filed against it herein, do forthwith proceed to provide all equipment and material, and to construct, within its right-of-way limits on State Highway Route No. 12, Project 460-E, over its tracks and right-of-way at Antlers, Virginia, an overhead crossing in accordance with the plans and specifications submitted by the State Highway Commissioner by communication dated January 7, 1931, to Southern Railway System, copy of which appears as Exhibit A with the complaint;

It is further ordered it having been indicated by counsel that it is the purpose of Southern Railway Company to take an appeal from the decision of the State Corporation Commission as embodied in the opinion and in this order, which is final as to the rights of the parties in the premises, that his matter be continued upon the docket of the State Corporation Commission for the purpose of such further orders and action by the Commission as may be necessary in the premises in and about the performance of the directions of the Commission should an appeal not be taken or should the decision of the Commission be sustained upon appeal, and that the matter be subject to be set for a specific date on the motion of either party, after reasonable notice, or by the Commission upon its own motion, and, it having been indicated by counsel for the relator that any requirements as to bond or other security that might be imposed by the Commission are at this time waived, it is directed that this order be, and it hereby is, suspended, without bond or other security for a period of 90 days in order that an appeal may be taken from the action of the Commission.

BEFORE STATE CORPORATION COMMISSION

Case No. 4469

COMMONWEALTH OF VIRGINIA at the Relation of H. G. SHIRLEY, State Highway Commissioner, Complainant,

vs.

SOUTHERN RAILWAY COMPANY, Defendant

OPINION—March 8, 1932

[fol. 72] Opinion by FLETCHER, Commissioner:

This is a proceeding arising out of a complaint filed by the relator, H. G. Shirley, State Highway Commissioner, hereinafter termed "the relator", against the Southern Railway Company, a Virginia corporation, hereinafter termed "the defendant", setting forth that the relator is the State Highway Commissioner of Virginia, and vested with authority and charged with duties as provided by law; that the defendant is a railroad corporation, owning and operating lines of railroad in Virginia and elsewhere, and particularly a line of railroad in Mecklenburg county, Virginia, at or near Antlers, whereon is located a certain grade crossing which is complained of; that, under the authority conferred upon him by act of the General Assembly of Virginia, approved February 27, 1930, identified as chapter 62, Acts 1930, p. 74 (Michie's Virginia Code of 1930, section 3974-a), amending and re-enacting previously existing acts of the same or similar import, the relator had in his official capacity ascertained and determined that the existing grade crossing at grade of State Highway No. 12, project 460-e, by the railroad owned and/or operated by the defendant near Antlers in Mecklenburg county, Virginia, should be eliminated and an overhead crossing substituted therefor, and that said elimination and substitution is necessary for the public safety and convenience; that pursuant to such ascertainment and determination the relator gave to the defendant a written notice in the form of his letter of January 7, 1931, attached to the complaint as Exhibit A; that said elimination and substitution had been the subject of negotiation between the relator and the defendant for some-

time and that the defendant had pursuant to and in the course of such negotiation prepared and submitted to the relator plans for such work, which were approved by the relator; that in compliance with the aforesaid act of the General Assembly, the relator on January 7, 1931, submitted to the defendant plans and specifications of the proposed work, they being the same as those theretofore submitted by the defendant and approved by the relator; that thereupon it became the duty of the defendant to provide all equipment and materials and construct such overhead crossing, in accordance with the said plans and specifications within the right of way limits of the defendant, and that the relator had called upon the defendant to proceed with the performance of the duty imposed upon it by law, as aforesaid, which was alleged to be a public duty imposed upon the defendant by law; that not- [fol. 73] withstanding the said public duty the defendant had failed and refused to comply with said requirement of the relator and provide equipment and materials and to construct the overhead crossing within its right of way limits in accordance with said plans and specifications, the defendant contending that the statute, under the supposed authority of which the relator had acted, was unconstitutional and void; that the relator, in his official capacity, had complied with all the requirements of law and particularly with the requirements of said chapter 62, and that it is the public duty of the defendant to comply with the terms thereof and provide the equipment and materials and construct the overhead crossing within its right of way limits, in accordance with said plans and specifications; that, under the provisions of said chapter, upon completion of the work, including that part thereof required to be done by the defendant and the part thereof required to be done by the relator, the cost of said work, exclusive of any cost of right of way, should be divided between and borne by the defendant and the Commonwealth of Virginia in equal parts, provided the defendant should have complied with the provisions thereof; that the State Corporation Commission, under the Constitution and statutes of Virginia, is vested with the power and charged with the duty of (1) receiving such complaint; (2) ascertaining and determining whether the defendant has failed or refused to comply with the duty imposed upon it by

law; and (3) compelling it to perform the said duty by proper fine or fines, or otherwise enforcing the performance by the defendant of its duty; that the relator asked that proper notice be given and process served upon the defendant and that it be made party defendant to the complaint and be required to perform the duty imposed upon it under the terms and provisions of said chapter 62, and to provide all equipment and materials and construct said overhead crossing within its right of way limits, in accordance with the plans and specifications so submitted, and that all such further orders might be entered as the nature of the case might require. The notice attached to the complaint as Exhibit A and made a part thereof, which was averred to be the only notice of any kind served upon the defendant, read, omitting caption and signature, as follows:

"GENTLEMEN:

Subject: Overhead Highway Bridge near Antlers, Virginia, MP. AD-125.92, State Highway Route 12, Project 460-E.

[fol. 74] Pursuant to the provisions of chapter 62, Acts of the General Assembly of Virginia, 1930, and following up the correspondence with reference to this matter, I am writing to notify your Company that in my opinion the public safety and convenience requires that the present grade crossing, located near Antlers, Mecklenburg county, Virginia, Mile Post AD125.92, State Highway Route 12 Project 460-E, be eliminated and that the crossing be made above the tracks of your Company at a point located approximately 432 feet east of Mile Post No. 126.

I am submitting herewith plans and specifications of the proposed work.

The plans for this particular overhead were prepared by you and submitted to me for approval and were approved by me, these plans being designated as drawing No. 4091, dated November 22, 1928. For your information, I am also enclosing a copy of sheet No. 8, of the plans for State Highway Project 460-E, Route 12, revised December 11, 1928.

I call your attention to the provisions of the above mentioned Act of the General Assembly of Virginia and to the

duties imposed upon your Company therein.

I am giving this notice so that you may proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted within the right of way limits of your Company as required by law.

Will you please acknowledge receipt of this notice.

Very truly yours," —— ——.

The defendant replied to such notice by a letter addressed to the relator, which read, omitting caption and signature, as follows:

"Your letter of January 7, 1931, with enclosures, addressed to Southern Railway System, attention Mr. J. B. Akers, has been referred to me.

Southern Railway does not agree with your opinion as expressed in that letter, that the public safety and convenience requires that the present grade crossing near Antlers be eliminated and that an overhead crossing be built above the tracks. As I wrote you on December 27th, 1930, it is further our opinion that chapter 62, Acts of General Assembly of Virginia, 1930, is an unconstitutional and void enactment. Therefore, unless and until it should be finally de-
[fol. 75] termined by the courts that it is a valid statute, this Company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

The complaint was filed with and docketed by the Commission and an order was entered by it requiring the defendant to appear before the Commission in its courtroom, at Richmond on March 30, 1931, when the Commission would investigate and consider all evidence relative to the complaint, and would enter and issue such orders and afford such relief as in its judgment might be proper. The defendant appeared and filed a demurrer asserting that the complaint did not state a cause of action for the reasons therein specifically set forth, which may be summarized as follows:

1. That the sta-ute upon which the complaint is predicated is unconstitutional and invalid under the due process.

clause of Article 1, section 11 of the Constitution of Virginia, and under the due process clause of the 14th Amendment to the Constitution of the United States, in that it denies to defendant, and would deprive defendant of its property without due process of law, in the procedural or primary sense, in the respects more particularly set out in paragraph 1 of the demurrer, sub-paragraphs and b.

2. That the acts of the relator, the determination made by him and the requirement undertaken by him to be imposed upon the defendant, were and are null and void, and arbitrary as being without authority of any valid law, the statute asserted by relator as authority therefor being unconstitutional.

3. That the complaint does not show that said determination was made or said requirement was sought to be imposed with due process of law, but shows, on the contrary, that they were made and sought to be imposed without any prior notice and hearing to the defendant, without primary due process of law, and based solely upon an ex parte opinion of the relator, formulated without due process and without authority of law.

4. That such determination and requirement are therefore wholly insufficient to impose any legal duty on the defendant to contribute its property and to construct, in ac- [fol. 76] cordance with the relator's requirement, and that the complain- shows no such duty as having been constitutionally imposed upon defendant.

5. That the complaint fails to show that the defendant has failed or refused, or is failing or refusing to perform any constitutional or lawful duty imposed upon it by due process of law.

The demurrer was argued by counsel of the respective parties, and the disposition of such demurrer is the question now under consideration.

Chapter 62, Acts of 1930, p. 74, approved February 27, 1930 (Michie's Virginia Code of 1930, section 3974-a), which is relied upon by the relator as the basis for his complaint, is as follows:

"Section 1. Whenever a new State road is projected across a railroad, or an existing State road is to be so

changed as to cross a railroad, and the State Highway Commissioner shall be of the opinion that the public safety or convenience at such crossing requires that the State road shall cross the railroad above or beneath the tracks of the said railroad, or *whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead or underpass crossing becomes, in the opinion of the State Highway Commissioner, necessary for the public safety or convenience, or whenever, in the opinion of the State Highway Commissioner, the public safety and convenience requires that an overhead or underpass crossing of a railroad and a State highway* shall be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, *the State Highway Commissioner shall notify in writing the railroad company whose track is to be crossed or upon which the existing crossing at grade,* or the overhead or underpass crossing *is,* as the case may be, *stating particularly the point at which the crossing is desired or the existing grade crossing is to be eliminated,* or the overhead or underpass is to be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, as the case may be, *and that the public safety or convenience requires that the crossing* [fol. 77] *be made either above or beneath the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above or beneath the tracks of said railroad,* or that the overhead or underpass crossing be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, as the case may be, *and shall submit to said railroad company plans and specifications of the proposed work,* the said crossing to be deemed *to start at the points on each side of the tracks of the railroad where the grade* under the plans and specifications herein provided for *leaves the ground line of the State road to go over or under, as the case may be, the tracks of the railroad,* and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead or underpass crossing,* or widen, strengthen, remodel, redesign, relocate or replace

the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, as the case may be, *in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits* and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on between the State Highway Commissioner and the railroad company; *provided, however, that if the railroad company be not satisfied with the plans and specifications submitted by the State Highway Commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the State Highway Commissioner be unable in the meantime to agree on plans and specifications,* if the railroad company and the State Highway Commissioner be unable in the meantime to agree on plans and specifications, *including the grade of the approaches and the point to which the liability of the railroad shall extend, file a petition with the State Corporation Commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the State Highway Commissioner, or other plans in lieu thereof;* and it shall thereupon *be the duty of the railroad company to provide all equipment and materials and construct,* widen, strengthen, remodel, redesign, relocate or replace, as the case may be, *the overhead or underpass crossing* or provide a new or improved structure in lieu [fol. 78] thereof, *within its right of way limits,* and the *State Highway Commissioner the portion outside of the railroad right of way,* unless otherwise mutually agreed upon, in acordance with the plans and specifications approved by the State Corporation Commission.

"Upon completion of the work, including road way, approaches, drains and ditches and structures, in accordance with the plans and specifications, the railroad company shall file with the State Highway Commissioner an itemized statement of the cost of the work done by such company, certified by an executive officer of such company, and the State Highway Commissioner shall file with the railroad

company an itemized statement of the cost of the work done by him, if any, exclusive in each instance of the cost of right of way, and *if the cost of the work* done by the railroad company *exceeds one-half* of the total cost of the work done by the railroad company and the State Highway Commissioner, and provided the estimated cost of the entire work shall have first been approved by the State Highway Commissioner, the *Commonwealth shall* be obliged to *pay* to the railroad company, within thirty days, *the amount of such excess paid by the railroad company.* If the cost of the work done by the State Highway Commissioner exceeds one-half of such total cost, then the railroad company shall, within thirty days, pay to the Commonwealth the amount of such excess, such amount to be paid into the State treasury to the credit of the State highway system construction funds. All costs for which the State is responsible under this act shall be paid out of funds available for the construction of roads in the State highway system.

"After such work has been done, the railroad company shall maintain the portion within the right of way lines, except the surface of the roadway." (Italics ours.)

This statute is an amendment and re-enactment of an act originally passed on March 7, 1924 (Acts 1924, p. 146), which undertook to provide only for the construction of new overhead or underpass crossings of railroads by State highways and for the elimination of existing grade crossings on State highways by such new construction. The Act of 1924 was amended and re-enacted by an act approved March 19, 1926 (Acts 1926, p. 397), in an effort to fix the railroad's participation in such new overhead and underpass construction as extended beyond the right of way limits and from grade departure point to grade departure [fol. 79] point. By the 1930 amendment the act was made to apply to widening, strengthening, remodeling, redesigning, relocating, or replacing an existing overhead or underpass crossing, or providing a new or improved structure in lieu thereof, and such amendment also changed the system of apportioning cost, as set out in the second paragraph of the act.

The first question presented by the demurrer which will be considered is whether or not the Commission has jurisdiction to grant the relief prayed for in the complaint.

This question depends primarily upon the validity of the statute, for if valid the duty imposed upon the railroad company is a public duty imposed by law, and the breach of this duty is within the purview of sections 3716 and 7317 of Michie's Virginia Code of 1930, by which the Commission is given power to require a railroad company to perform and discharge any public duty or requirement imposed by law and is charged with the duty of making inquiry and examination for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of the law and which carry into effect clause (b) of section 156 of the Constitution of Virginia, conferring upon the Commission power to require public service corporations to perform any public duty.

See

Southern R. Co. vs. Com., 124 Va., 36, 97 S. E. 343;
Southern R. Co. vs. Com., 128 Va. 176, 105 S. E. 65;
Norfolk & Western R. Co. vs. Com., 143 Va. 106, 129 S. E. 324;
Commonwealth vs. Atlantic, etc., R. Co., 106 Va. 61, 65, 55 S. E. 572.

"The obligations imposed upon railway corporations in this State, whether by the Constitution, *statutes*, or the common law, are obligations imposed by law. The supervision of the discharge of these obligations is committed to the Corporation Commission." (Italics ours.) Saunders, J., in Southern R. Co. vs. Com., 128 Va. 176, 105 S. E. 65.

In Southern R. Co. vs. Com., 124 Va. 36, 97 S. E. 343, it was held that under clause (b) of section 156 of the Constitution and sections 3972-3974 of the Code of Virginia, which will hereinafter be quoted, the Commission may require railroad companies to eliminate grade crossings of county roads and highways.

Having arrived at the conclusion that a duty imposed [fol. 80] upon a railway company by law is a public duty, and that the Commission has the power to require a railroad company to perform and discharge any public duty or requirement imposed by law, the next question to be considered is whether or not the statute purporting to impose such public duty is unconstitutional as contended for by the defendant, for if unconstitutional, then no public duty is imposed by law.

In order to arrive at a proper understanding of the attitude of the State of Virginia in respect to compelling railroads to separate the grades of their tracks from the grades of the public highways, the history of the statutory enactments in respect to separation of grades should be reviewed. Section 38 of chapter 4 of Acts 1902-3-4, which was the same as section 3972, Michie's Code of Virginia 1930, read:

"It is hereby declared to be the policy of this State that all crossings of one railroad by another, or of a county road or highway by a railroad, or of a railroad by a *county road or highway*, shall, wherever reasonably practicable, pass above or below the existing structure. And every railroad hereafter constructed across another railroad or across a *county road or highway*, and every *county road or highway* hereafter constructed across a railroad, shall, *wherever it is reasonably practicable, and does not involve an unreasonable expense, all the circumstances of the case considered*, pass above or beneath the existing structure at a sufficient elevation or depression, as the case may be, with easy grades, so as to admit of safe speedy travel over each. The provisions of this section shall not apply to crossings in cities or towns, nor to electric railways within or without cities and towns." (Italics ours.)

Section 39 of chapter 4 of the Acts of 1902-3-4, the latter part of which was the same as section 3974 of Michie's 1930 Code of Virginia, read as follows:

"Whenever the elimination of *an existing crossing* of a *county* road, street or other highway by a *railroad*, at grade, becomes, *in the opinion* of the board of supervisors of any county, or the proper authorities of a city or town, *necessary* for the improvement of the county road, street or other highway, the said board of supervisors, or proper authorities of the city or town, may make *application in writing* to the manager, or other proper officer of the rail- [fol. 81] road company, for the elimination or abolition of such crossing, setting forth in such application the reasons therefor; and if said railroad shall refuse or fail to commence the work of eliminating or abolishing such crossing within a period of sixty days after said application in writing has been filed with the said railroad company by

the board of supervisors, or proper authorities of the city or town, the said board of supervisors, or the proper authorities of the city or town, may then *apply to the State Corporation Commission* by petition, setting forth the facts, which, in its opinion, justify the elimination of such crossing, and said *Commission shall hear the complaint as other complaints are heard and determined by that body.* When the crossing is constructed at an elevation, the approaches and structures shall be safe, permanent and substantial, and when the crossing is constructed underneath the tracks of the railroad, the county road, street or other highway, and all necessary drains and ditches shall be put in good, permanent condition, and the structure supporting the tracks of the railroad shall be safe, permanent and substantial. *Whenever the character of the work* to be done on the structures, county roads, streets, or other highways, drains and ditches *cannot be agreed on* by the corporation and the board of supervisors of the county, or the proper authorities of the city or town, *the same shall be fixed and determined by the State Corporation Commission.* When such improvement is to be made in any railroad, it shall be made by the corporation, or person operating the same, and the whole expense thereof shall be paid my such corporation, company or person. When it is to be made in a county road, street or other highway, it shall be made by the corporation whose track is to be crossed, and the expense shall be borne equally by said corporation and by the county, city or town having control of such county road, street or other highway. Provided, however, that *whenever an existing crossing* of a county road, street or other highway by a railroad or of a railroad by a county road, street or other highway, at grade, constructed since June 13, 1904, or hereafter constructed *becomes, in the opinion* of the board of supervisors of any county or the proper authorities of a city or town, *a menace to the public safety,* or the elimination of such crossing becomes necessary for the improvement of the county road, street or other highway, *and the costs thereof, and by whom and in what proportion paid cannot be agreed on by the corporation and the board of supervisors of the county or the proper authorities of the city or town, the same shall be fixed and determined by the* [fol. 82] *State Corporation Commission* in conformity with

the principles of law and equity. After said crossing has been constructed, the corporation whose tracks or works is crossed shall maintain the same." (Italics ours.)

It will be observed that such statutory enactment provides that if the railroad company fails or refuses to eliminate the grade crossing, after notice from the board of supervisors or proper authorities of the city or town that such elimination in their opinion is necessary for the improvement of the county road, street or highway, the board of supervisors or proper authorities of the city or town may apply to the Commission by petition, setting forth the facts which in its or their opinion justify the elimination of such crossing, and the Commission shall hear the complaint, as other complaints are heard or determined by that body. Under the procedure before the State Corporation Commission, notice is required to be given to the railroad company, and at such hearing it is entitled to an opportunity to be heard. From the order entered by the Commission in respect to the elimination of such grade crossing an appeal will lie to the Supreme Court of Appeals of Virginia. Southern R. Co. vs. Com., 124 Va. 36, 97 S. E. 343. The Supreme Court of Appeals, in construing such sections of the Act of 1902-3-4 (Michie's 1930 Code of Virginia, sections 3792, 3794), declared that to require the establishment of an overhead or underground crossing where it is not reasonably practicable and would involve an unreasonable expense, all the circumstances of the case considered, would be as much against the policy of the State as to permit a grade crossing where those difficulties are not shown to exist. Norfolk & Western Ry. Co. vs. Tidewater R. Co., 105 Va. 129, 52 S. E. 852; Lanham vs. Virginia Air Line R. Co., 113 Va. 68, 78, 73 S. E. 566; Southern R. Co. vs. Commonwealth, 124 Va. 36, 97 N. E. 343.

In Southern R. Co. vs. Com., 124 Va. 36, 97 S. E. 343, in construing such legislation, it was held that all grade crossings are more or less inconvenient and dangerous, but mere inconvenience or necessary dangers usually incident to such crossings would not justify the exercise by the Commission of jurisdiction to compel separation of grades at the expense of the railroad companies, and that the continuance of existing grades should be the rule, the change of the

grade at the expense of the railroad company the exception, and this exception should not be made except for cogent [fol. 83] reasons; that while the Commission has jurisdiction to compel railroads to separate the grades of their tracks from the grades of the public highways, and to make the grades of their tracks above or below the grades of such highways, and where the change is at the instance and for the benefit of the railroad company, to require the railroad company to pay the entire expense, as a rule existing crossings should be left undisturbed unless the change is effected under the provisions of said section 39, which section clearly indicates that as to existing grade crossings of county roads by railroads, when the local authorities desire to improve the county roads by separating the grades, they may require the railroad authorities to make the necessary change only upon the condition that the expense thereof be equally borne by the county and the railroad company, and that the jurisdiction of the Commission to compel a separation of grades at existing crossings at the expense of railroad companies should only be exercised in exceptional cases where the proof is clear and satisfactory that a duty rests upon the railroad company to make it in consequence of some peculiar danger to the traveling public.

The word "county" as used in such act setting forth the duty of a railroad in crossing a "county road or highway" was held to be used in the sense of an adjective to modify or limit both "road" and "highway", and it was held that from their collection these words were equivalent to "county road or county highway." Washington R. Co. vs. Fisher, 121 Va. 229, 92 S. E. 809.

At the time of the passage of such act, with the exception of toll roads, the only public roads in Virginia were "county roads" or "county highways" which were under the control and jurisdiction of the board of supervisors of the respective counties, and this continued until the creation in 1918 of the "State highway system" and the establishment, by Acts 1918, p. 9, of State roads or State highways as distinguished from county roads or county highways. By chapter 16, Acts of 1918, there was created the first State highway system, setting said highways apart from all other highways in Virginia, and it was provided that the roads embraced in the State highway system

should be established, constructed and maintained exclusively by the State, under the direction and supervision of the State Highway Commissioner, with such State funds as might thereafter be appropriated and made available for such purposes, together with such appropriations as [fol. 84] might thereafter be made by any county, district or town in Virginia, and such funds as were found available or as might thereafter be derived from the Federal government for road building and improvement in Virginia, and it was further provided that "the roads within the State highway system which may now or shall hereafter be, in the opinion of the State Highway Commissioner, in maintainable condition, shall be maintained by the State from funds now or hereafter available for this purpose, said maintenance to be under the direction and supervision of the State Highway Commissioner, but this shall not ap-ly to toll roads so long as toll gates are maintained thereon." The State Highway System Act was amended by chapter 316, Acts of 1922, and at the same session as cognate legislation (chapter 403, Acts of 1922), there was passed a general act creating the State Highway Commission and the office of State Highway Commissioner, giving the Commission and the Commissioner certain powers and exclusive jurisdiction over the State highways. The State Highway Commission is an administrative department of the State, charged with certain powers and duties, defined by statute. (Michie's Virginia Code of 1930, section 1969-a-1969-p.)

Such statutes creating the office of State Highway Commissioner provided that, except such powers as are conferred upon the State Highway Commission, the State Highway Commissioner "shall have plenary powers for constructing, improving and maintaining the roads embraced in the highway system". (Michie's Virginia Code of 1930, section 1969-f.) He is vested with the power of eminent domain in so far as may be necessary for the construction, reconstruction, alteration, maintenance and repair of the roads embraced in the State highway system, and for these purposes, and all purposes incidental thereto, may condemn property in fee simple, and may without the institution of condemnation proceedings take from the most convenient lands, so much land, stone, gravel, earth or other material as may be necessary to be used in the construction, reconstruction and maintenance of any of the

roads and bridges embraced in the State highway system, upon payment of proper compensation or damage, which, if not agreed upon between him and the land owner, shall be determined by viewers. (Michie's Virginia Code of 1930, section 1969-j.) By other statutory provisions, the State Highway Commissioner is charged with the duty of laying out and maintaining and keeping in repair suitable detours where State highways or roads are being improved, constructed and maintained, and is vested with the power [fol. 85] to close the whole, or any portion, of a State road during construction and erect suitable barriers or obstructions thereon. (Michie's Virginia Code of 1930, sections 1969-k, 1969-l.) It is also provided that he shall have supervision of the construction and repair of the main traveled roads of the State; that he is authorized to do any and all things necessary to carry out the provisions of the Act of Congress of July 11, 1916, relative to Federal aid in the construction of rural post roads, etc. (Mitchie's Virginia Code of 1930, section 1973-a.) His powers and duties in connection with the roads embraced within the State highway system have been heretofore adverted to. (See Michie's Virginia Code of 1930, sections 1975-d, 1975-f, 1975-o, 1975-s, 1975-t, 1975-z, 1975-aa and 1975-bb.)

From the above statutory provisions relative to the State Highway Commissioner. it is evident that he is an administrative arm of the State government charged with many administrative functions and powers and charged with the decision of a legislative question in determining the necessity for condemning land for the construction, etc., of roads in the State highway system. State Highway Commissioner vs. Yorktown Ice & Storage Company, 152 Va. 559, 147 S. E. 239.

The jurisdiction of the State Highway Commmissioner over the State roads embraced in the "State highway system" is a part of the police power of the State, delegated to him by the General Assembly. Southern Ry. Co. vs. Commonwealth, 124 Va. 36, 58, 97 S. E. 343.

Upon the creation of the State highway system and the taking of the roads embraced therein from the supervision and control of the board of supervisors of the county in which they were located and the transfer of such control and supervision to the State Highway Commissioner, it became necessary to make provision for the elimination of

grade crossings by a railroad across a State road or vice versa, and to confer upon the State Highway Commissioner powers and duties in relation thereto. None of the statutes creating the State Highway Commission, or the State highways, or providing for the State Highway Commissioner, conferred upon the State Highway Commisson or the State Highway Commissioner any power to make any requirement for the elimination of grade crossings of State highways and railroads or to require railroad participation in any such elimination or construction of any overhead or underpass crossing. The Act of 1924 above referred to (Acts 1924, p. 146) was the first attempt to confer any such [fol. 86] power upon this officer. The Acts of 1924, 1926 and 1930, relating to the separation of grades where a State road was involved, differed materially from the Act of 1902-3-4 relating to "county roads" or "county highways", in that they did not provide for a hearing before the State Corporation Commission or any tribunal upon the question of whether the elimination of an existing grade crossing, or its improvement, is reasonable and practicable, and does not involve an unreasonable expense, all the circumstances of the case considered, and in effect declared it to be the policy of the State that crossings at grade of a State road by a railroad or of a railroad by a State road should be eliminated whenever such elimination or substitution therefor of an overhead or underpass crossing becomes, in the opinion of the State Highway Commissioner, necessary for the public safety or convenience. By such legislation the question of whether or not the elimination of such grade crossings is reasonable and practical and may be done without unreasonable expense is not a factor, and the only question is whether such elimination is necessary for the public safety or convenience, and the determination of this question is delegated to the State Highway Commissioner, an administrative officer of the State. If in his opinion it is necessary, then he so notifies the railroad company, and submits plans and specifications of the proposed work, the said crossing to start at points on each side of the tracks of the railroad where the grade under the plans and specifications leaves the ground line of the said road to go over or under, as the case may be, the tracks of the railroad, and to include all work and structures between those points. Upon the giving of such notice and the sub-

mission of such plans and specifications, it becomes the duty of the railroad company to provide all equipment and materials and construct the overhead or underpass crossing, as the case may be, in accordance with the plans and specifications so submitted within its right of way limits and of the State Highway Commissioner such portion outside of such railroad right of way limits. If the railroad company is not satisfied with the plans and specifications so submitted to it, and it and the State Highway Commissioner cannot agree upon other plans and specifications, including the grade of the approach and the point to which the liability of the railroad shall extend, provision is made for the filing of a petition by the railroad company with the State Corporation Commission setting forth its objections to the plans and specifications so submitted to it and its [fol. 87] recommendations of other plans in lieu thereof, and the Commission is required to hear such complaint and to approve the plans submitted by the State Highway Commissioner, or other plans in lieu thereof, and thereupon it becomes the duty of the railroad company to provide all equipment and materials and construct the overpass or underpass, as the case may be, within its right of way limits, unless otherwise mutually agreed upon, "in accordance with the plans and specifications approved by the State Corporation Commission". The railroad company is required to pay one-half of the cost of the entire work, and the State is required to pay the other one-half. It is to be noted that after the State Highway Commissioner determines that the public safety or convenience requires the elimination of the grade crossing and so notifies the railroad company and submits plans and specifications of the proposed work, his power and authority with respect to the elimination of the grade crossing c-ases. If the railroad company is not satisfied with such plans and specifications, and it and the State Highway Commissioner cannot agree, it may have a hearing before the Commission on the question of what plans and specifications, including the grade of the approaches and the point to which the liability of the railroad shall extend, shall be approved, and the Commission may approve either the plans and specifications submitted by the State Highway Commissioner or other plans in lieu thereof. The Commission is vested with the jurisdiction to determine what plans shall be adopted, and an

appeal will lie to the Supreme Court of Appeals of Virginia. (Constitution of Virginia 1902, section 156-d, Code of Virginia, section 3833.)

The fact that the statute in question delegates to the State Highway Commissioner the function to ascertain and determine that the public safety or convenience requires the elimination of a particular grade crossing, without prior notice to the railroad company and without an opportunity to be heard being given to it and that the statute makes no provision for a review by the State Corporation Commission of whether the grade crossing should be eliminated and an overhead or underpass crossing substituted therefor is the basis of the defendant's claim that such statute is unconstitutional. The substance of such contention is set forth in its brief as follows:

"The statute does contain a provision for a review by [fol. 88] the State Corporation Commission, not as to the merits of the question whether the grade crosing *shall* be eliminated and an overhead or underpass crossing substituted, but *only* in the case in which the railroad does not challenge this question, but merely disagrees *with the particular plans and specifications submitted by the State Highway Commissioner.* In such event, if the railroad's objection is only as to the particular plans and specifications, as distinguished from an objection to the requirement itself that the grade crossing be eliminated and an overhead or underpass crossing be substituted, and if, pursuant to such objection, the railroad company, within sixty days, files a petition with the State Corporation Commission, setting out its objections to the plans and specifications and its recommendation of alternative plans and specifications, the statute undertakes to authorize the State Corporation Commission to hear the railroad's complaint and to select between the alternative plans, the Highway Commissioner's requirement as to plans to be modified only to this extent. No such case is presented here. The statute makes no provisions for a review by the State Corporation Commission or by any other forum of the *fundamental* question, *whether the railroad shall be required to contribute to and join in the construction of an overhead or underpass crossing* as a substitute for and to eliminate an existing grade crossing.

"Where the railroad's objection is to this *fundamental* proposition, the statute does not make the slightest pre-

tense of providing for anything in the way of procedural due process to the railroad, but undertakes to impose a final duty upon the railroad upon the sole basis of the *ex parte* opinion and requirement formulated and made by the individual administrative officer, the State Highway Commissioner without prior notice and without hearing."

We think the jurisdiction conferred upon the Commission is broader than that stated by the defendant and that under such statute the Commission is not limited to the approval of the plans and specifications submitted by the State Highway Commissioner or those submitted by the railroad company, but may prescribe other plans in lieu of such as have been presented.

It is settled beyond question that the State, in the exercise of its police power, may require the abolition or elimination of existing grade crossings between streets or highways and railroads and that railroad companies may be [fol. 89] required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways.

New York & N. E. R. Co. vs. Bristol, 151 U. S. 556, 38 L. Ed. 269;

Cincinnati, I. & W. R. Co. vs. Connersville, 218 U. S. 336, 54 L. Ed. 1060;

Northern Pacific R. Co. vs. Duluth, 208 U. S. 583, 52 L. Ed. 630;

Chicago, M. & St. P. R. Co. vs. Minneapolis, 232 U. S. 430, 438, 58 L. Ed. 671, 674;

Missouri Pacific R. Co. vs. Omaha, 235 U. S. 121, 59 L. Ed. 157, 160;

Northern Pacific R. Co. vs. Puget Sound & W. H. R. Co., 250 U. S. 332, 63 L. Ed. 1013;

Erie R. Co. vs. Public Utilities Comrs., 254 U. S. 394, 409, 412, 65 L. Ed. 322, 334;

Missouri, K. & T. R. Co. vs. Oklahoma, 271 U. S. 303, 70 L. Ed. 957, 961;

Lehigh Valley R. Co. vs. New Jersey Public Utility Com'rs., 278 U. S. 24, 73 L. Ed. 161;

Richmond, Fredericksburg & Potomac R. Co. vs. Richmond, 145 Va. 225, 133 S. E. 800.

In Missouri, K. & T. R. Co. vs. Oklahoma, 271 U. S. 303, 70 L. Ed. 957, 961, Mr. Justice Butler, delivering the opinion of the court, said:

"It is elementary that for the safety and convenience of the public, the State, either directly or through its municipalities, may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. (Citing authorities.)"

In Erie R. R. Co. vs. Board of Public Utility Commissioners, 254 U. S. 394, 65 L. Ed. 322, Mr. Justice Holmes, delivering the opinion of the court, quoted with approval Chicago, M. & St. P. R. Co. vs. Minneapolis, 232 U. S. 430, 438, 58 L. Ed. 671, 674, where it was said:

[fol. 90] "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways."

In Richmond, Fredericksburg & Potomac R. Co. vs. Richmond, supra, Burks, J., quoted with approval Erie R. Co. vs. Board of Public Utilities, supra.

The police power of the State to eliminate grade crossings in the interest of public safety and convenience is not subordinate to the power of the Interstate Commerce Commission over interstate railroads.

Matter of Staten Island Rapid Transit Ry. Co., 220 N. Y. App. Div. 80, 221 N. Y. Supp. 129, citing Erie Railroad Co. vs. Board of Public Utility Commissioners, 254 U. S. 394, 65 L. Ed. 322.

The Federal Transportation Act does not affect the State's power to abolish grade crossings.

Lehigh Valley R. Co. vs. New Jersey Public Utility Commissioners, 278 U. S. 24, 73 L. Ed. 161.

The abolition of grade crossings, being referable to the police power of the State, necessitates the consideration of

the right of the State to exercise such police power. In the consideration of this case two questions present themselves: (1) Whether the statute is in contravention of the due process clause of section 11 of article I of the Constitution of Virginia or of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because it does not provide that, prior to the making by the State Highway Commissioner of his requirement that a grade crossing be eliminated, the railroad company shall be given an opportunity to be heard on the question; and (2) whether the Federal Constitution or the Constitution of Virginia prohibits the delegation to the State Highway Commissioner of the function in question. These questions will now be considered.

While the police power is very broad and far reaching and it is practically impossible to definitely fix its bounds, yet [fol. 91] the provision of the Fourteenth Amendment to the Federal Constitution providing that no State shall deprive any person of life, liberty or property without due process of law, etc., was not designed to interfere with the proper exercise of the police power by the State.

Barbier vs. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923;
Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205;
Coppage vs. Kansas, 236 U. S. 1, 59 L. Ed. 441;
Lochner vs. New York, 198 U. S. 45, 49 L. Ed. 937;
Richmond, Fredericksburg & Potomac R. Co. vs. Richmond, 145 Va. 225, 133 S. E. 800.

See also:

Chambers vs. McCollum, 47 Idaho 74, 272 Pac. 707;
Packard vs. O'Neil, 45 Idaho 427, 262 Pac. 881, 885;
State vs. Nijin, 140 La. 793, 74 So. 103;
City of Shreveport vs. Nijin, 140 La. 785, 73 So. 996;
La Coste vs. Department of Conservation of State of Louisiana, 151 La. 909, 92 So. 381, judgment aff'd 263 U. S. 545, 68 L. Ed. 437;
Guttag vs. Shatzkin, 230 N. Y. 647, 130 N. E. 929;
People vs. LeFetra, 230 N. Y. 429, 130 N. E. 601;
Ex Parte Company, 106 Ohio St. 50, 139 N. E. 204;
Pritz vs. Messer, 112 Ohio St. 628, 149 N. E. 30;
Valley Spring Hog Ranch Co. vs. Plagmann, 282 Mo. 1, 220 S. W. 1;
Stockwell vs. State (Tex. Civ. App.), 203 S. W. 109.

In Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205, 211, 213, it was held that it belongs to the legislative department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety—subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the Constitution; that the 14th Amendment of the Constitution does not take from the States those powers of police that were reserved at the time *of* the original Constitution was adopted, and that the States did not intend, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. Mr. Justice Harlan, delivering the opinion of the court, said:

[fol. 92] "This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier vs. Connolly, 113 U. S. 31 (28 L. Ed. 924), that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.'

"Undoubtedly the State, when providing, by legislation, for the protecion of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the General Government. * * *

"Upon this ground—if we do not misapprehend the position of defendants—it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

[fol. 93] "This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. * * *

"The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitution of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle—equally vital because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. * * *

"As already stated, the present case must be governed by the principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. *A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health,*

morals, or safety of the community, cannot, in any just sense, *be deemed a taking of an appropriation of property for the public benefit. Such legislation* does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but *is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.* Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. *The exercise of the police power* by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, *is very different from taking property for public use, or from depriving a person of his property without due process of* [fol. 94] *law.* In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." (Italics ours.)

In Cooley's Const. Lim. (8th Ed.), p. 1232, it is said:

"Where the Power is Located.—In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty,

obstruct or impede the exercise of any authority which the Constitution had confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution."

All rights and privileges acquired by a railroad company "are held subject to the police power of the State, or those to whom it is lawfully delegated." Burks, J., in Richmond, Fredericksburg & Potomac R. Co. vs. Richmond, supra.

Section 159 of the Constitution of Virginia reads in part:

"The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to *infringe* the equal rights of individuals or *the general well being* of the State." (Italics ours.)

Such a constitutional provision is merely declarative of a fundamental principle of government. Kansas City vs. Kansas City Terminal Ry. Co., 324 Mo. 882, 25 S. W. (2d) 1055.

The State of Virginia did not surrender the police power when it entered the Federal Union and the right to exercise such power was not repealed or overthrown by the adoption of the Fourteenth Amendment.

Buck vs. Bell, 143 Va. 310, 130 S. E. 516;
Richmond, Fredericksburg & Potomac R. Co. vs. Richmond, 145 Va. 225, 133 S. E. 800.

[fol. 95] The defendant contends that "the Act of 1930, and asserted regulation by the State Highway Commissioner undertaken to be made thereunder and sought to be enforced in the present proceeding", are unconstitutional and void under the due process clauses of the State and Federal Constitution "because they deny this defendant *procedural* or *primary* due process, and would *take its property* without such procedural due process", and also that the statute in question "denies essential procedural due process and undertakes to authorize the *taking of defendant's property* without such procedural due process". This contention cannot, however, be sustained. The requirement that a railroad, at its own expense, abolish a grade crossing and substitute therefor an overhead or underpass crossing, as the case may be, is *not* in any proper sense a taking of property of the railroad company without

compensation, and is not violative of the due process clause of the Fourteenth Amendment.

The requirement that a railroad company eliminate a grade crossing, and pay even the entire cost thereof, is not a taking of property without due process of law.

Northern Pacific Ry. Co. vs. Puget Sound & Willapa Harbor Ry. Co., 250 U. S. 332, 63 L. Ed. 1013, 1018;

Detroit, Ft. W. & B. I. R. Co. vs. Osborn, 189 U. S. 383, 47 L. Ed. 860, 864;

New Orleans Public Service Co. vs. New Orleans, 281 U. S. 682, 74 L. Ed. 115, 118;

Chicago & Alton R. Co. vs. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204, 1210.

In New Orleans Public Service vs. New Orleans, 281 U. S. 682, 74 L. Ed. 1115, 1118, Mr. Justice Butler, delivering the opinion of the court, said:

"It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law. Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S. 226, 251, 41 L. Ed. 979, 989, 17 Sup. Ct. Rep. 581; Chicago, B. & Q. R. Co. vs. Illinois, 200 U. S. 561, 594, 50 L. Ed. 596, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 175; Chicago & A. R. Co. vs. Tranbarger, 238 U. S. 67, 77, 59 L. Ed. 1204, 1211, 35 Sup. Ct. Rep. 678."

[fol. 96] In Northern Pacific Ry. Co. vs. Puget Sound & Willapa Harbor Ry. Co., 250 U. S. 332, 63 L. Ed. 1013, 1018, it was held that a railway company whose road was constructed at a time when the State law imposed the entire cost of the construction of a crossing of two railways at grade, including installing and maintenance of interlocking devices, upon the junior company, is not deprived of its property without due process of law by construing as applicable to it a subsequent statute under which the expense of a grade crossing by a junior company is to be divided equally between the two railway companies. Mr. Justice Clarke, delivering the opinion of the court, said:

"While this is sufficient to dispose of the case, it may be added that the Act of 1913 was passed in an obviously

legitimate and customary exercise of the police power of the State to protect travelers and employees from injury and death at such crossings, and also to protect property in the custody of the carriers from damage. It has long been settled law that the imposing of uncompensated charges, involved in obeying a law passed in a reasonable exercise of the police power, *is not a taking of property without due process of law,* within the meaning of the 14th Amendment to the Constitution of the United States." (Italics ours.)

In Detroit, Ft. W. & B. I. R. Co. vs. Osborn, 189 U. S. 383, 47 L. Ed. 860, 864, it was held that neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the commissioner of railroads requiring such street railway to pay one-half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed. Mr. Justice McKenna, delivering the opinion of the court, said:

"In Flint & P. M. R. Co. vs. Detroit & B. C. R. Co., 64 Mich. 350, 31 N. W. 281, the court * * * cited the case of Massachusetts C. R. Co. vs. Boston, C. & F. R. Co., 121 Mass. 124, where Mr. Justice Gray, then chief justice of the supreme judicial court of Massachusetts, expressed the law as follows:

" 'A railroad corporation across whose road another railroad or highway is laid out has the like right as all individuals or bodies politic and corporate owning land or easements, to recover damages for the injury occasioned to its [fol. 97] title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. * * * But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; *nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad.*" (Italics ours.)

In Missouri P. R. Co. vs. Omaha, 235 U. S. 121, 59 L. Ed. 157, 160, there was involved an ordinance of the city of Omaha requiring a railroad company to construct and complete a viaduct and approach on one of the streets of the city, of the width, height, strength, and of the material and manner of construction required by the city engineer and according to plans and specifications prepared by him. The railway company sought to enjoin the city from enforcing the provisions of the ordinance. It was held that a railway company may, consistently with due process of law, be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, the consequent cost to the company being, as a matter of law, damnum absque injuria, or deemed to be compensated by the public benefit which the company is supposed to share; that the courts cannot interfere with the exercise of the police power by enjoining regulations in the interest of the public safety which the legislature has duly enacted, provided the means employed have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights; that the entire cost of constructing a viaduct over the tracks of a railway company at a street crossing may, consistently with due process of law, be imposed upon the railway company by a duly authorized municipality acting under State authority, although the structure ordered by the city being designated to carry the tracks of a street railway company operating in such street, will cost considerably more than a viaduct sufficient to carry the ordinary street traffic. Mr. Justice Day, deliverying the opinion of the court, said:

[fol. 98] "That a railway company may be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is damnum absque injuria, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court * * * This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose au-

thority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. * * *"

The defendant admits that, for the safety and convenience of the public, the State may directly by a legislative act require the elimination by a railroad company of grade crossings and apparently admits that a statute requiring railroad companies to eliminate all grade crossings in the State and to substitute therefor overhead or underpass crossings would be open to no constitutional objections. The defendant also admits that a State may delegate to a municipal corporation the power to require a railroad company to eliminate grade crossings and that an ordinance passed by a city council in pursuance of such delegated power will not be open to objection, as the city is an arm of the State and the ordinance is an enactment by a branch of the legislative department of the State—the municipal legislature—under express legislative authority. But the defendant contends that in considering the constitutional guaranty of due process where the State in the exercise of its police power provides for the elimination by a railroad of grade crossings and the substitution therefor of overhead or underpass crossings, there is a distinction between a direct regulation by the legislature or a direct regulation by an ordinance passed by a municipal corporation vested with authority by the legislature to regulate, and an act of the legislative undertaking to delegate to an administrative board or officer the power to make a particular regulation in respect to a grade crossing. This contention is set forth in its brief as follows:

"In considering the constitutional guaranties of *pro*-
[fol. 99] *cedural* due process it is necessary to keep in mind the distinction between a *direct* regulation by the legislative act itself and an act of the legislature *undertaking to delegate to an administrative board or officer* the power to make a particular regulation and impose it upon a particular person.

"Where the regulation is directly imposed by the legislature in its own statute, a statute of general application, it

is held that prior notice and right to a particular hearing according to forms of law is not necessary to due process, the theory being that all citizens are represented in the legislature, have notice of its proceedings, and that it itself holds a hearing on its proposed bill before its enactment. But where the statute does not itself make and impose the regulation, create the duty, take the property by its provisions generally applicable, but seeks to delegate to an administrative board or officer the power to make or not make the regulation in a particular instance, to apply or not apply it to a particular person with the result of taking his property if applied to him, *then prior notice and hearing before the making and application of the regulation are essential to procedural due process of law.* In the latter case the law itself must *require* and give the legal *right* to prior notice and hearing. It is not enough that the person sought to be charged by the regulation may by chance have had notice in fact, or that he may have been granted a hearing as a matter of favor or courtesy, as distinguished from a hearing *required* by the law itself."

In other words, the defendant contends that where the State delegates to an administrative board, or to an administrative officer, the determination of a particular fact or state of facts upon which the application of a police regulation shall depend, it is essential that the person affected thereby shall be given notice or have an opportunity to be heard before such determination shall be made. No pertinent authority is cited by the defendant in support of its contention as to the necessity for what the defendant terms "procedural due process of law" where the power is delegated to an administrative board or officer to determine the fact or state of facts upon which a statute passed in the exercise of the police power of the State shall become effective.

The provision of the Fourteenth Amendment to the Federal Constitution that no person shall be deprived of property without due process of law does not require in the exercise of the State's police power that a notice and hear-
[fol. 100] ing of a judicial nature be had. Harmon vs. Bolley, 187 Ind. 511, 120 N. E. 33.

In Harmon vs. Bolley, 187 Ind. 511, 120 N. E. 33, Blair, J., delivering the opinion of the court, said:

"The Supreme Court of the United States has declined to attempt a definition of what amounts to due process of law, saying: 'What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in Davidson vs. New Orleans, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded'. (96 U. S. 97, 104, 24 L. Ed. 616.) It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.' Hagar vs. Reclamation Dist. (1883), 111 U. S. 701, 707, 4 Sup. Ct. 663, 667 (28 L. Ed. 569). It is apparent that this inhibition of the Fourteenth Amendment is very broad in its scope and comprehensive in its application. The decisions of the Supreme Court of the United States seem to indicate the provision applies to every exercise of the governmental power of a State whereby a citizen may be deprived of property in a manner which is not in accordance with the law of the land or with the due course of the law. In determining what amounts to *be* due process of law, the nature of the governmental power called into exercise should be considered as well as the result which is to be accomplished by the proceeding; and the method of process adopted should be suited to a proper and efficient exercise of the governmental power and should be adapted to attain the desired result. It should be just to the parties to be affected and should provide for a notice and hearing when necessary to a just protection of private rights. Turpin vs. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70. A notice and hearing [fol. 101] are held to be essential to proceedings which involve the life or liberty of a citizen. Hagar vs. Reclama-

tion Dist., supra; Simon vs. Craft (1900), 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; Japanese Immigrant Case, 189 U. S. 86, 100, 23 Sup. Ct. 611, 47 L. Ed. 721.

"'Due process of law in each particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' Cooley, Const. Lim. (7th Ed.), 506. *A notice and a hearing of a judicial nature is not essential in all cases to due process of law,* for the reason that such a proceeding is not ordinarily appropriate to the exercise of the particular governmental power invoked, and is not well adapted to accomplish the result desired. *No such procedure is required by the Fourteenth Amendment, where a State is engaged in the exercise of its police power.* Bartemeyer vs. Iowa, 18 Wall. 129, 21 L. Ed. 929. In the case of Murrays' Lessee vs. Hoboken Land Co., 18 How. 272, 15 L. Ed. 372, it was held that a notice and hearing of a judicial nature was not essential to due process of law in the enforcement of a balance due from a collector of customs by a distress warrant issued by executive authority prescribed by law." (Italics ours.)

In Block vs. City of Chicago, 239 Ill. 251, 87 N. E. 1011, 1015, it was held that an ordinance requiring one operating a moving picture show to obtain a permit from the chief of police whose duty it is made to refuse the permit if the film required to be submitted to his inspection depict "immoral or obscene" pictures, but which does not provide for giving to the applicant for a permit a day in court for the determination of the question whether the picture or series of pictures is immoral or obscene, does not violate the due process of law clause. The court said:

"It is further argued that the ordinance deprives complainants of their property without due process of law. Defendant has a right to prohibit the exhibition of immoral or obscene pictures, and the complainants would not be deprived of any right if they are prevented from exhibiting pictures of that class. If the ordinance is enforced according to its terms, they will not be deprived of any property or right or the use of any property which they

[fol. 102] have a legal right to use. The only thing alleged in the bill having any relation to the question is the fact that the complainants will have to pay rent for the films or pictures during the time necessary for inspection by the chief of police. There would be no greater delay than is necessary in any case where a permit must be obtained for any purpose, and if the defendant may require the permit there is no lack of due process of law. The ordinance being general in its terms and applying to all persons engaged in the moving picture business, the complainants are not subject to any unlawful burden.

"There is a further argument that *some sort of a hearing* is required in court to determine the fact whether a picture proposed to be exhibited, or one that has been exhibited, is immoral or obscene. *We know of no decision sustaining such a doctrine*, and counsel do not appear to have found any. As we have already seen, there is no lawful objection to the determination of the question by the chief of police." (Italics ours.)

In Spokane Hotel Co. vs. Younger, 113 Wash. 359, 194 Pac. 595, it was held that a statute creating the industrial welfare commission and authorizing it to fix minimum wages for women, was not invalid as working a deprivation of property without due process of law, in violation of Const. U. S. Amend. 14, Sec. 1, or Const. Wash. Art. 1, Sec. 3, because there was no provision for notice to employers. The statute involved the exercise of the police power of the State. Mount, J., delivering the opinion of the court, said:

"The appellants argue that this statute is void because it violates the constitutional provision that 'no person shall be deprived of life, liberty, or property without due process of law.' In Larsen vs. Rice, 100 Wash. 642, 171 Pac. 1037, the constitutionality of this act was attacked. . . . That decision was based upon Stettler vs. O'Hara, 69 Or. 519, 139 Pac. 743, L. R. A. 1917C, 944, Ann. Cas. 1916A, 277, and Simpson vs. O'Hara, 70 Or. 261, 141 Pac. 158, Id., 243 U. S. 629, 37 Sup. Ct. 475, 61 L. Ed. 937. The appellant here apparently concede- that the subject of the act is within the police power of the Legislature as a measure to insure the public health, welfare and safety, and do

not attack the act upon that ground, *but insist that the act makes no provision for notice to persons affected by the act and for that reason is void.* It is insisted that this question was neither presented nor considered in the case [fol. 103] of Larsen vs. Rice, supra; that the Oregon statute makes provision for notice and a hearing while our statute makes no provision for notice to persons affected by the order. Counsel for appellants cite a large number of cases from the Supreme Court of the United States and other courts to the effect that where individual rights or property is taken there must be notice and an opportunity to be heard. *Most of these cases, if not all of them,* are cases affecting the rates to be charged by common carriers *and are judicial in their nature.* These cases are readily distinguishable from the case before us, *because the duties of the industrial welfare commission* as fixed by the act under consideration *are administrative and not judicial.* • • •

We are of the opinion that *employers have no vested right to employ women or minors* and therefore *are not entitled to notice as a matter of right.* The Legislature in the exercise of its police power may take away whatever rights the employer has in that respect. It was said in Chicago, etc., Ry. Co. vs. Nebraska, 170 U. S. 57, at page 77, 18 Sup. Ct. 513, at page 521 (42 L. Ed. 948), quoting from a New York case, as follows:

" 'The Legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case. • • • *The fact that the Legislature has chosen to delegate a certain portion of its power to the board of health* • • • *would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order.* • • • Laws and regulations *of a police nature, though they may disturb the enjoyment of individual rights,* are not unconstitutional, though no provision is made for compensation for such disturbance. *They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.* If he suffer injury, it is

either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.'

"We are satisfied therefore that the act does not infringe upon either of the constitutional provisions above mentioned." (Italics ours.)

The error into which the defendant has fallen results [fol. 104] from its failure to properly distinguish between due process of law in judicial proceedings and due process of law in governmental or administrative matters. That such a distinction obtains is well settled by the Federal and State decisions.

The Fourteenth Amendment to the Federal Constitution does not itself define due process of law. What was such before its adoption continues such. It does not prohibit a State from future, new legislation, action, or proceeding necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person.

Eames vs. Savage, 77 Me. 212, 52 Am. Rep. 751;
State vs. Sponaugle, 45 W. Va. 415, 32 S. E. 283.

In considering what is due process of law, Brannon, P., in State vs. Sponaugle, 43 W. Va. 415, 417, 32 S. E. 283, said:

"No definite definition—none but the most general—has been or can be given of 'due process of law'. The best the courts can do is to say, in each base as it arises, whether a given act or proceeding in the particular matter is due process of law. It depends how the question arises; that is, upon the matter or transaction involved. Davidson vs. New Orleans, 96 U. S. 97 (24 L. Ed. 616). What would be due process *if done under the police power* or taxing power *might not be, in many cases would not be, if not done under either of those powers.* 3 Am. & Eng. Enc. Law, 714. A horse may be lawfully seized and sold, without judge or jury, for taxes; but an individual or officer or court or legislature, without trial, generally could not do this. In Davidson v. New Orleans, 96 U. S. 97 (24 L. Ed. 616), Justice Bradley said: 'In judging what is due process of law,

respect must be had to the cause and object of taking, whether under the taxing power, the power be had to the cause and object of taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found arbitrary, oppressive, and unjust, it may be declared to be not due process of law.' * * *

"If there is anything settled by the United States Supreme Court, it is that the requirement of due process of [fol. 105] law does not always require judicial procedure. Justice Miller said, in Davidson vs. New Orleans, * * * that there is abundance of evidence that there exists 'a strange misconception of the scope of this provision as found in the Fourteenth Amendment;' * * * What is this amendment? Except as a limitation upon state action, it is not new, as respects the demand of 'due process of law.' That is simply a new application. It only demands of the state what Magna Charta demanded from the time our English ancestors set foot on American soil, and was in the constitution of all the states. For the first time that amendment gave the national government a veto power upon state action upon the citizen not consonant with due process of law, but it gave no new definition of the term 'due process of law', or its equivalent, 'law of the land'. Before it, the state had final right to say whether the act was due process; after it, the supreme court has. That is all. The definition is the same. Eames vs. Savage (77 Me. 212), 52 Am. Rep. 757. The amendment does not say what due process is. If it had long been established as such in the state, it is due process under the amendment. Slaughter-House Cases, 16 Wall. 78. Legislation, action, and procedure long used by the state as usual or customary in the given cases were not at once swept away because not attended with judicial inquiry. Nor does this amendment cramp the states so as to forbid the adoption of new legislation, action, or procedure which they may deem necessary, wise, and politic in the administration of government. In either case, so it do not assail the essential of the citizen under the principles of common, equal justice, it is valid under this amendment. * * * This constitutional law, state and federal, I repeat, is old, and

its definition the same at all times; and yet legislation and procedure under state authority, and federal, too, levying taxes, seizing and selling personal and real estate for taxes, personal for rent, *seizing and confiscating personalty under the police power,* and even selling a defaulting customs receivers' property under a warrant issued by an executive officer for a debt arising from his collection of tariff, and imprisonment under a mere license tax bill, have not been discovered to be without due process. The Fourteenth Amendment is highly salutary as a part of the federal constitution, properly construed and applied, as it has been thus far by that eminent tribunal, the Supreme Court of the United States; *but it cannot be given the scope often claimed for it, practically denying to the state power highly essential in the administration of the government.* [fol. 106] This construction has been several times repudiated by the supreme court." (Italics ours.)

Though due process of law generally implies and includes actor, reus, judex, regular allegations, opportunity to be heard, and a trial acording to some settled course of judicial proceedings, yet this is not universally true.

Murray vs. Hoboken Land & Imp. Co., 18 How. (U. S.) 272, 15 L. Ed. 372;

Davidson vs. Board of Admrs. of New Orleans, 96 U. S. 97, 24 L. Ed. 616, 619;

Ekiu vs. United States, 142 U. S. 651, 35 L. Ed. 1146;

Fong Yue Ting vs. United States, 149 U. S. 697, 37 L. Ed. 905, 913;

Lem Moon Sing vs. United States, 158 U. S. 538, 39 L. Ed. 1082, 1084;

Yamataya vs. Fisher, 189 U. S. 86, 47 L. Ed. 721, 725;

Commonwealth vs. Byrne, 20 Gratt. 165;

State vs. Sponaugle, 45 W. Va. 415, 32 S. E. 283.

In considering the provisions of the Constitution which prohibit the legislature from depriving any person of his property without due process of law, a distinction must be drawn between controversies between man and man, that is, judicial proceedings, and proceedings where the government, through its established agencies, in the exer-

cise of its police power, interferes with the use and enjoyment of private property.

Cooley's Const. Lim. (8th Ed.); pp. 740, 741;
Stockwell vs. State (Tex. Civ. App.), 203 S. W. 109.

In Cooley's Const. Lim. (8th Ed.), pp. 740, 741, it is said:

"The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. * * * *When the government through its established agencies interferes* with the title to one's property, *or with his independent enjoyment of it* and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judg- [fol. 107] ment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, *different considerations from those which regard the controversies between man and man must prevail*, different proceeding- are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

This principle was recognized in Stockwell vs. State (Tex. Civ. App.), 203 S. W. 109, 112, where it was held that the constitutional provision in respect to taking property without due process of law has a different meaning when applied to controversies between citizens than it has when the legislature, in the exercise of the police power, interferes with the use and enjoyment of private property. Pleasants, C. J., said:

"The provision of the Constitution which prohibits the Legislature from depriving any citizen of his property ex-

cept by due course of the law of the land has a *different meaning, when applied to controversies between citizens, to that given it when property is taken or destroyed by the government for public use or the public welfare; and when the Legislature, in the exercise of its police powers, interferes with the use and enjoyment of private property, we have only to see that the interference is justified by established rules applicable to the special case.* Cooley's Constitutional Limitations, Sec. 435. It would be a *strained construction* of our Constitution *to hold that the exercise of police power by the state cannot be valid without a judicial trial for ascertaining in each case the necessity of the authorized action.* The method provided in this statute for the condemnation and destruction of diseased plants does not have the elements of a judicial trial, but the proceedings are appropriate and adapted to the nature of the case and must be held valid. Every one's right to the use and enjoyment of property is necessarily limited in organized society by consideration of public welfare and safety, and Legislature, in the exercise of police power of the state, can [fol. 108] enforce this limitation by any reasonable method appropriate to its accomplishment, and the citizen must submit. To hold otherwise would deny society the right to protect itself by lawful means. * * * The contention that the destruction of appellant's property, under the provisions of this statute, is a violation of the constitutional inhibition, against the taking of private property for public use without compensation to the owner, is one that seems to us has much force, but it has been decided by our courts that this provision of the Constitution only applies to the taking of property by the state under its powers of eminent domain, *and is not a limitation upon the police power.*" (Italics ours.)

Due process of law does not always require a judicial hearing. It does in matters of purely judicial nature, but not in matters which are governmental or administrative, where there is involved no taking of property.

Breiholtz vs. Pocahontas County, 257 U. S. 118, 66 L. Ed. 159, 163;

State Savings & Commercial Bank vs. Anderson, 165 Cal. 437, 132 Pac. 755, 758;

People vs. Globe Grain & Milling Co., 211 Cal. 121, 249 Pac. 3, 5;
Cunningham vs. Northwest Imp. Co., 44 Mont. 180, 119 Pac. 554;
State vs. Sponaugle, 45 W. Va. 415, 32 S. E. 283.

In Breiholtz vs. Pocahontas County, 257 U. S. 118, 66 L. Ed. 159, 163, it was held that committing to a board of supervisors the power to determine without notice or hearing when repairs to a drainage system are necessary, and the extent of them, cannot be said to deny process of law to the landowners in the district, who are assessed for the cost in the same proportion that the original cost was assessed, except possibly where confiscation or spoliation results. Mr. Justice Clarke said:

"The only possible source of objection remaining is the committing to the board of supervisors the power to determine, *without notice and hearing, when repairs are necessary and the extent of them. But these are details of state administration with which the Federal authority will not interfere,* except, possibly, to prevent confiscation or spoilation, of which there is no suggestion in this case. [fol. 109] Davidson vs. New Orleans, 96 U. S. 97, 106, 24 L. Ed. 616, 620, and cases cited, supra.

"The propriety of resorting to such a practice—process of law applicable to such a case—is commended to us by the comment of the supreme court of Iowa, in deciding this case, saying:

" 'The duty (to keep the drainage system open and in repair) is one which is continuous, calling for supervision from day to day, and month to month, or, in the language of the statute, "at all times". The work to be done may involve considerable expense or it may be a succession of petty repairs, each of which is comparatively inexpensive. To require that in each case the board must advertise the job and seek the lowest bidder (and hold hearings with respect to it) would be to hamper and prevent its efficient action without any corresponding benefit to the public'. (186 Iowa 1147, 173 N. W. 1.)" (Italics ours.)

In State Savings & Commercial Bank vs. Anderson, 165 Cal. 437, 132 Pac. 755, 758, Lorigan, J., delivering the opinion of the court, said:

"As said in American Land Co. vs. Zeiss, 219 U. S. 65, 66, 31 Sup. Ct. 206 (55 L. Ed. 82): 'It is to be borne in mind that it has been settled (Griffith vs. Connecticut, 218 U. S. 563 (31 Sup. Ct. 132, 54 L. Ed. 1151), and cases cited) that the Fourteenth Amendment does not operate to deprive the states of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights'.

"In State vs. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, the court says: 'The test of a police regulation when measured by this clause of the Constitution is reasonableness, as contradistinguished from arbitrary or capricious action. * * * Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large *discrimination* is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. [fol. 110] * * * If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable, and so extravagant in nature and purpose as to capriciously interfere with and destroy private right.' * * *

"As is settled by the authorities the state has unquestionable power to adopt such measures respecting matters affecting the public welfare as it deems expedient and when it sees fit to regulate upon a matter which is within its police power its authority over the subject is plenary and can only be reviewed by the courts to the extent of determining whether the regulation is reasonable. * * * The amendment was never designed to interfere with the police power of the state to regulate for the public good on some particular subject which in the judgment of the Legislature called for regulations. * * * Nor is the due process

of law clause violated *because such summary seizure is authorized to be made without action brought and judicial warrant for the taking. Due process of law does not necessarily imply a regular proceeding in a court of justice or after the manner of such courts.* As said in Davidson vs. New Orleans, 96 U. S. 97 (24 L. Ed. 616): 'In judging what is "due process of law". respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for legal improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law"; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law".'" (Italics ours.)

In People vs. Globe Grain & Milling Co., 211 Cal. 121, 294 Pac. 3, 5, there was involved a statute authorizing the fish and game commission to grant revocable permits, in such amounts and subject to such restrictions and regulations as the Commission might prescribe, to take and use fish by reduction or extraction process for the manufacture of edible products, provided, among other things, it be shown to the satisfaction of the commission that such use of fish would not tend to deplete the species or result in waste or deterioration of such fish. The statute involved [fol. 111] was an amendment of an original statute which expressly provided for a hearing, but no hearing was provided for in the amended statute. The court held that notwithstanding the fact that no hearing was provided for, the statute was constitutional; that a statute granting discretion to an administrative body is not unconstitutional where the statute contains a guide to and a limitation upon the actions of such body, and that if the statute requires an administrative body to determine the existence of necessary facts before making a discretionary decision, essential requirements of due process are complied with and the statute does not give uncontrolled discretion. The court said:

"The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor. * * * The two statutes are similar

in the one important respect that in each the discretionary power vested in the Commission is controlled by a standard or guide set forth in the law itself. It is true that one contains more specific restrictions than the other. This is purely a matter of legislative policy, and does not affect the constitutional problem. The only substantial difference between them, so far as concerns the question of administrative discretion, is that *the original statute expressly provides for a hearing. The difference is not material. The essential requirement of due process is merely that the administrative officer or body be required to determine the existence or nonexistence of the necessary facts before any decision is made.* If the statute requires this, it does not vest an uncontrolled discretion, and the officer or body may not act arbitrarily." (Italics ours.)

In Jackson County vs. Neville, 131 Miss. 599, 95 So. 526, there was involved a statute providing that a bill of accountants appointed to audit books and accounts of county officers should be submitted to the Circuit Judge, whose duty it should be to approve the same if found correct and reasonable, and if approved, then to the Governor, who, if he found the same correct and reasonable, should approve the same. It was urged that the statute violated the due process clause of the Federal and State Constitutions but such contention was not sustained by the court, which held that the hearing before the judge and the Governor was not [fol. 112] a judicial proceeding and, therefore, due process was not required. Anderson, J., delivering the opinion of the court, said:

"It is contended that the statute violates the due process clause of the Constitution of the state and of the United States because the hearing before the circuit judge and the Governor is ex parte; no notice being required to be given the county whose funds are sought to be thus taken or appropriated. A complete answer to that contention is that the hearing before the circuit judge and the Governor is not a cause in court, is not a judicial proceeding, and due process is not required."

It is held by the Supreme Court of the United States that while Congress cannot withdraw from judicial cognizance any matter which from its nature is a subject of

judicial determination, yet it is well settled that there are certain governmental matters which involve the ascertainment of facts, the final determination of which may be entrusted by Congress to certain executive or administrative officers, and in such a case the officer is made the sole and exclusive judge of the existence of those facts and his decisions, acting within the powers expressly conferred by congress, are due process of law.

Murray vs. Hoboken Land & Imp. Co., 18 How. (U. S.) 15 L. Ed. 372;
Ekiu vs. United States, 142 U. S. 651, 35 L. Ed. 1146;
Fong Yue Ting vs. United States, 149 U. S. 697, 37 L. Ed. 905, 913;
Lem Moon Sing vs. United States, 158 U. S. 558, 39 L. Ed. 1082, 1084;
Yamataya vs. Fisher, 189 U. S. 86, 47 L. Ed. 721, 725;
Public Clearing House vs. Coyne, 194 U. S. 497, 48 L. Ed. 1092.

In Fong Yue Ting vs. United States, 149 U. S. 697, 37 L. Ed. 905, 913, which involved the validity of an order that an alien should be deported, Mr. Justice Gray, delivering the opinion of the court, said:

"*It is no new thing for the law making power, acting* either through treaties made by the President and Senate, or *by the more common method of acts of Congress, to* [fol. 113] *submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decisive of such officers in the first instance,* with such opportunity for judicial review of their action *as Congress may see fit to authorize or permit.* * * *

"To repeat the careful and weighty words uttered by Mr. Justice Curtis, in delivering a unanimous judgment of this court upon the question what is due process of law: 'To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. *At the*

same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Den vs. Hoboken Land & Imp. Co., 59 U. S. 18 How. 272, 284, 15 L. Ed. 372 377." (Italics ours.)

In Public Clearing House vs. Coyne, 194 U. S. 497, 48 L. Ed. 1092, there was involved an appeal from a judgment dismissing a bill to enjoin the postmaster of the city of Chicago from denying the privileges of the mails and of the money order and registered letter system to the complainant by virtue of a "fraud order" issued by the Postmaster General. The Federal statutes empowered the Postmaster General to direct the seizure and return of all letters addressed to persons conducting certain prohibited enterprises and to forbid the payment by any postmaster of any postal money order drawn in favor of any person engaged in the prohibited business. It was held that the lack of any provision for a judicial hearing on the question of illegality did not render the statute repugnant to the due process clause of the Federal Constitution since the action of the Postmaster General is subject to revision by the courts in case he has exceeded his authority under such legislation. Mr. Justice Brown said:

"It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster General to seize and return to sender all letters addressed to a particular person, firm, or corporation which he is [fol. 114] satisfied is making use of the mail for an illegal purpose. Their constitutionality is attacked upon three grounds: First, because they provide no judicial hearing upon the question of illegality; second, because they authorize the seizure of all letters, without discriminating between those which may contain, and those which may not contain, prohibited matter; and, third, because they empower the Postmaster General to confiscate the money, or the representative of money, of the addressee, which has become his property by the depositing of the letter in the mails.

"It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. Bates & G. Co. vs. Payne, 194 U. S. 106, ante, 894, 24 Sup. Ct. Rep. 595. *That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations.* Doe ex dem. Murray vs. Hoboken Land & Imp. Co., 18 How. 272, 280, 15 L. Ed. 372, 376; Bushnell vs. Leland, 164 U. S. 684, 41 L. Ed. 598, 17 Sup. Ct. Rep. 209. As was said by Judge Cooley, in Weimer vs. Bunbury, 30 Mich. 201: 'There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. *Much of the process by means of which the government is carried on and the order of society maintained is purely or administrative.* * * *" (Italics ours.)

In Butterfield vs. Stranahan, 192 U. S. 470, 48 L. Ed. 525, there was involved a statute forbidding the importation of teas inferior to the government standards of purity, quality and fitness for consumption, which authorized the Secretary of the Treasury to establish such standards upon the recommendation of a board of tea experts, but which left to him the executive duty to effectuate the legislative policy declared in the statute. It was contended that the statute denied to the importer due process of law in that it failed to accord him a hearing before the Board of Tea [fol. 115] Inspectors and the Secretary of the Treasury in establishing the standard in question and before the board of appraisers upon the re-examination of the tea. Mr. Justice White, delivering the opinion of the court, said:

"It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the

board of tea inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the re-examination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, *we are of opinion that the statute was not objectionable for that reason.* The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred." (Italics ours.)

The last paragraph of this case was quoted with approval in Hunter vs. Colfax Consolidated Coal Co., 175 Iowa 245, 154 N. W. 1037.

In Health Department vs. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, there was involved the validity of a New York statute, enacted in 1887, requiring that all tenement houses should be furnished with a supply of Croton water by the owners thereof "whenever they shall be directed so to do by the board of public health". It was further provided that the Board of Health should see to it that all tenement houses were so supplied before January 1, 1889. In 1891 the Board of Health notified the defendant to furnish such water, and upon is failure to do so brought an action in its own name for the purpose of recovering the penalty for the violation of the act. Trinity Church resisted an order of the Board of Health directing the furnishing of the water. Its chief contention was that the order of the board was made without notice to the owner, that compliance would require considerable expense, and that it was deprived of its property without an opportunity to be heard, and that, therefore, the statute was unconstitutional, as amounting to a taking of property without due process of law. Peckham, J., said:

[fol. 116] "Assuming that this act is a proper exercise of the power, in its general features, we do not think that it

can be regarded as invalid because of the fact that it will cost money to comply with the order of the board for which the owner is to receive no compensation, or because the board is entitled to make the order under the provisions of the act, without notice to and a hearing of the defendant. As to the latter objection, it may be said, that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety, it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature. (People ex rel vs. Board of Health, 140 N. Y. 1, 6.) The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water is directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If, in such case, the enforcement of the direct command of the legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the State or Federal Constitution would be violated. *The fact that the legislature has chosen to delegate a certain portion of its powers to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order.* I have *never* understood that it was *necessary that any notice* should be given under such circumstances before a provision of this nature could be carried out." (Italics ours.)

The defendant in its brief seeks to distinguish this case on the grounds that Trinity Church was not required by the Board of Health to install the water supply in obedience to the statute at any time prior to January 1, 1889, the final date at which the statute required all tenements, regardless of age, to be so provided, and the final date having passed,

[fol. 117] the statute became universally applicable to all tenements, with no discretion left in the State Board of Health to longer excuse compliance, and that after that date the dead line of the statute made it applicable to all tenements, and on March 20, 1891, the Board of Health served notice on Trinity Church requiring it within five days to obey the then universal obligation of the statute. This contention is made in an effort to show that the case turned on direct and not delegated regulations, but in fact the case was decided on the validity of regulations passed under delegated power, as will be observed from that portion of the opinion reading:

"So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the Legislature had enacted a general law that all owners of tenement houses, should within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, *but the plaintiff has not proceeded* under it." (Italics ours.)

That the case was decided on the ground that it was not necessary for the statute to provide that the Board of Health should give notice and afford a hearing to the owner before it made such order is apparent from the reference to this case made in Chicago, B. & Q. R. Co. vs. State of Nebraska, 170 U. S. 57, 42 L. Ed. 948, where Mr. Justice Shiras, delivering the opinion of the court, said:

"New York Health Department vs. Trinity Church, 145 N. Y. 32 (27 L. R. A. 710), was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, *whenever so directed by the Board of Health.* The statute *made no provision for notice* to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the Board. In the opinion of the court, per Peckham, J., it was said: 'The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect

in a particular case. * * * *The fact that the legislature has chosen to delegate a certain portion of its power to the Board of Health* * * * would not alter the prin- [fol. 118] ciple, *nor would it be necessary to provide that the Board shall give notice and afford a hearing to the owner before it made such order.* * * * Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." (Italics ours.)

See also Spokane Hotel Co. vs. Younger, 113 Wash. 359, 194 Pac. 595, also quoting with approval the same portion of the opinion in New York Health Department vs. Trinity Church, supra, as that last quoted.

In City of Brooklyn vs. Frantz, 33 N. Y. S. 869, 870, it was held that a city charter providing that any building in violation of the provision as to fire limits may be removed, but not requiring notice to be given to the owner of such building, is void, as authorizing the *taking* of private property without due process of law, and the objection is not obviated by giving notice to the owner. The court drew a distinction between statutes regulating the use of property and statutes contemplating its destruction, saying:

"We have not overlooked the fact that there are numerous statutes in this state which subject the owners of buildings, both public and private, to many limitations and requirements, and entail upon them additional expense. In crowded cities buildings cannot be constructed, within certain districts, of inflammable materials. Fire escapes are required, and water must be introduced upon each floor of certain houses. These are but examples, and under such statutory provisions the owner is entitled to no compensation for the increased expense to which he is subjected, *and no provision is made for any notice or opportunity to be heard.* The distinction is this: *Such statutes only regu-*

late the use of property, while the statute under review provides for and contemplates the use of property, while the statute under review provides for and contemplates its destruction without compensation." (Italics ours.)

The case upon which the defendant relies in support of [fol. 119] its contention that the statute committing to the State Highway Commissioner the function to require the elimination of a grade crossing violates the due process clause because it fails to provide for notice to or an opportunity to be heard by the railroad company are readily distinguishable.

Some of them were cases involving taxation where the legislature, instead of fixing the tax itself, committed to a subordinate body or officer the duty of determining whether, in what amount and/or upon whom the tax should be levied. Such was the character of the statute involved in Security Trust & Savings Banks vs. Lexington, 203 U. S. 323, 51 L. Ed. 204; Central of Georgia R. Co. vs. Wright, 207 U. S. 127, 138, 52 L. Ed. 134; and Turner vs. Wade, 254 U. S. 64, 65 L. Ed. 134, which are cited by the defendant in support of its contention.

It is well settled that "where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom the tax shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceeding, before the tax becomes irrevocably fixed, the taxpayer must have an opportunity to be heard, of which he must have notice either personal, or by publication, or by some statute fixing the time and place of the hearing".

Londoner vs. Denver, 210 U. S. 373, 385, 52 L. Ed. 1103, 1112;
Turner vs. Wade, 254 U. S. 64, 65 L. Ed. 134.

See also Cooley's Const. Lim. (8th Ed.), note 2, pp. 1048-1049.

The reason for this requirement of notice or an opportunity to be heard is stated to be that "the assessment of a tax is action judicial in its nature".

In Central of Georgia R. Co. vs. Wright, 207 U. S. 127, 134, 52 L. Ed. 134, 141, Mr. Justice Day said:

"Former adjudication in this court have settled the law to be that the assessment of a tax *is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require.*"

[fol. 120] Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 U. S. 673, 74 L. Ed. 1107, upon which the defendant also relies to support its contention that there is a distinction between the denial of procedural due process and the denial of substantive due process, involved a proceeding to enjoin the collection in part of a property tax based on an alleged discriminatory assessment by the taxing officials whose decisions had the effect of judgments. It was held that due process of law was denied by a decision of a state court denying an injunction against the collection of a tax based on an alleged discriminatory assessment, on the ground that the plaintiff had a remedy by complaining to the State Tax Commission before the tax books were delivered to the collector, and was guilty of laches in not so doing, where prior to the decision in the instant case an application to the State Tax Commission would have been unavailing because the highest court of the State had held in the former case that the Tax Commission was without authority to afford relief, and, at the time of the instant decision that it had such power, the time for filing such complaint had expired; that a violation of the due process law may be accomplished by the State judiciary in the course of construing an otherwise valid State statute, and that the Federal guaranty of due process extends to State action through its judicial, as well as through its legislative, executive or administrative branch of government, and that "whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy, unless there is, or was afforded to him some real opportunity to protect it." The case involved the denial of a hearing on an assessment of property by taxing officials where notice or an opportunity to be heard was essential and did not involve any question of the exercise of the police power and is in no wise authority for holding that where the State in the exercise of its police power delegates the ascertainment of certain facts

to a subordinate officer, an arm of the State, notice or an opportunity to be heard is essential.

In Violett's Heirs vs. Alexandria, 92 Va. 561, 23 S. E. 909, also relied upon by the defendant, it was held that the enforcement of a local assessment for improvements to a street where the person from whom the tax is exacted has had no opportunity to appear and contest the assessment before it is finally determined upon, and a lien fixed on his [fol. 121] property, is the taking of the property without due process of law and a statute authorizing such procedure without requiring notice and opportunity to be heard to be given to the property owner is in conflict with the Fourteenth Amendment to the Federal Constitution. It was pointed out by the court that "local assessments are made under the taxing power," and the court quoted with approval from Stuart vs. Palmer, 74 N. Y. 191, where it was said:

"It has always been the general rule in this country, in every system of assessment and taxation, to give the person assessed an opportunity to be heard at some stage of the proceedings. That due process requires this has been quite uniformly recognized."

See also, Cooley's Const. Lim. (8th Ed.), note 2, pp. 1048-1049, note 1; p. 1065.

This case did not involve any question of the exercise of the police power and is no authority for the contention of the defendant.

Coe vs. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027, is also cited by the defendant in support of its contention that the statute in question denies essential procedural due process of law. No question of the exercise of the police power by the State or the delegation of the police power to an administrative body, or arm of the State, was involved in this case. The statute involved provided that upon the return nulla bona of an execution against a corporation, an execution might issue against a stockholder for the amount of the unpaid subscription to the stock he held, without notice to him or other preliminary steps, he having the right, in case he was not in fact the holder of the stock upon which there was an unpaid subscription, or in case the amount of the execution was in excess of the unpaid sub-

scription, to appropriate relief of testing the legality of the execution after issuance and the execution in the absence of such objections being enforceable. Under such statute the property of the stockholder might have been seized and sold without any knowledge on the part of the stockholder of such fact. The failure to afford the notice or hearing, or opportunity to be heard essential under the due process of law clause, was held to render invalid such statute. The court said:

[fol. 122] "Against one and all, execution may be issued without notice or hearing; the judgment against the corporation and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or, receiving it, makes no objection, his property is taken in satisfaction of the corporation's debt—manifestly without due process of law."

Riverside & Dan River Cotton Mills vs. Menefee, 237 U. S. 189, 59 L. Ed. 910, also cited by the defendant in support of its contention, arose out of a judicial proceeding, and it was held that the courts of one State might not, without violating the due process of law clause of the Fourteenth Amendment, render a money judgment against a corporation organized under the laws of another State upon service on a resident director where the corporation had not come into the former State for the purpose of doing business therein and has done no business therein and has no property therein and no qualified agent upon whom process may be served. The court followed the doctrine established by the decision in Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565, which has been without deviation upheld by a long line of cases.

Hovey vs. Elliott, 167 U. S. 409, 42 L. Ed. 215, also so cited by the defendant, involved a judicial proceeding where it was held that a decree pro confesso in effect striking the defendant's evidence from the files as a punishment of his contempt for refusing to obey an order of court, is void for want of due process of law, the court holding that due process of law signifies a right to be heard in one's defense, and that the power of the court to deny favor to a person in con-

tempt does not include the power to refuse to a person in contempt the right to defend in the principal case on the merits.

Underwood vs. McVeigh, 23 Gratt. (Va.) 409, 419, also quoted from by the defendant, involved the validity of a deed made by United States Marshal for property sold under a decree of a Federal court which was held void. The facts were as follows: In 1863 proceedings were instituted in the District Court of the United States for Alex- [fol. 123] andria under an Act of Congress to confiscate certain real estate, on the ground that the defendant "was a resident of the city of Richmond within the Confederate lines and a rebel." Before the condemnation the respondent appeared, by counsel, and filed his answer, afterwards a motion was made to strike from the files the appearance, answer and claim of the respondent, and an order to that effect was duly entered, and the court thereupon, on the same date, decreed that the property should be sold at auction by the marshal. This was done, and the property was conveyed by the marshal to a sister-in-law, who was the wife of the judge of the District Court for the Eastern District of Virginia, who, as the judge of said court, entered all the orders above referred to. Upon appeal by the respondent to the Supreme Court of the United States the decree was reversed, and when the case came back to the District Court it was dismissed. Quite properly, Christian, J., delivering the opinion of the court in 1873, held that a tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence and that no judicial proceeding could deprive a man of the weight of a judicial sentence and that no judicial proceeding could deprive a man of any part of his property without giving him an opportunity to be heard, and that, therefore, the decree so doing was a nullity. Manifestly the case has no bearing upon the questions here involved.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, which is also relied upon by the defendant, arose out of a habeas corpus proceeding brought by a Chinaman who was found guilty of the violation of a certain ordinance, which provided that it should be unlawful for any person to engage in the laundry business within the corporate limits "without

having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," and it was held to be illegal to adjudge that he pay a fine, and, in default of payment, be imprisoned, as the ordinance did not prescribe a rule and condition for the regulation of the use of laundry property, to which all similarly situated might conform, but it conferred a naked arbitrary power upon the board to give or withhold consent, and made all engaged in the business the tenants at will as to their means of living, under the board of supervisors, and that the case presented ordinances in actual operation, and [fol. 124] the facts shown established an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinance as adopted, they were the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to all persons by the Fourteenth Amendment, Mr. Justice Matthews, delivering the opinion of the court, saying:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * * The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be re-

sisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged."

The facts involved in Yick Wo vs. Hopkins, supra, are in nowise similar to those involved in the case under consideration, and it cannot be perceived why the defendant states that it is "particularly pertinent to this case." In [fol. 125] Yick Wo vs. Hopkins, there was attempted regulation of a business which all citizens had an inherent or common right to pursue. Such right was not a mere privilege which might be permitted or prohibited at will. It differed from the business of a railroad, and the question involved was in no wise similar to the right of a railroad to maintain a grade crossing. In substance, the decision in Yick Wo vs. Hopkins was that the right of a person to use his building for the purpose of carrying on a laundry business in the city of San Francisco could not be made to depend on the unrestrained will of the city's board of supervisors, and that the laundry business, being of such character as calls for no special treatment similar to that, for instance, which the business of selling intoxicating liquors renders necessary, or to that of the right of a railroad to maintain a grade crossing, it was held that *regulation* was the limit of legitimate power and that such regulation must be equal and impartial in its application and that the right to conduct the business could not be left to be granted ex gratia.

See, also, Gundling vs. Chicago, 177 U. S. 183, 44 L. Ed. 725, where it was held that an ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation, and is a suitable person to be intrusted with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him an abitrary power to grant or refuse a license in violation of the Fourteenth Amendment of the Federal Constitution, and where Mr. Justice Peckham, delivering the opinion of the court, con-

sidered Yick Wo vs. Hopkins, supra, and distinguished the ordinance involved in that case from that under consideration.

The statute in question differs materially from that involved in the case of Chicago, M. & St. P. Ry. Co. vs. Board of Railroad Commissioners, 76 Mont. 305, 247 Pac. 162, 164, which the defendant in its brief says is "very closely in point to the question of constitutionality raised in the present case." The statute involved in such case provided that the Board of Railroad Commissioners of Montana should have power and authority "*after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto,* to compel railroads or other companies or corporations operating or holding themselves out to be common carriers in the State of Montana, *to extend or construct commercial or industrial spurs over constructed lines or tracks at* [fol. 126] *stations or from within station limits,*" provided the length of such spurs or tracks should not exceed ten miles from the head block to end of track. Under such statute arbitrary power was conferred upon the Board of Railroad Commissioners to order the carrier to construct the spur without requiring that notice of any hearing be given to the carrier or opportunity to produce testimony relative to the necessity of the spur. The statute involved was not as stated by the defendant in its brief "strikingly similar" to the statute involved in the present controversy, but differed materially therefrom in that the power was not conferred upon the Board of Railway Commissioners to order the carrier to construct the spur when the public safety or convenience required such construction, and that no limitation upon the power of the Board of Railway Commissioners in respect to the construction of the spur track except as to its length was found in the statute. The conferring of this arbitrary power upon the Board of Public Utility Commissioners to exercise their unlimited discretion and without notice to the railroad company or an opportunity to be heard, was held to be violative of the Fourteenth Amendment. There was plainly delegated to the railroad commissioners legislative power and not the power to determine some fact, or state of facts, upon which the enforcement of the statute depended. In addition, the statute, unlike that under consideration, involved the tak-

ing of the property, for it required the carrier to use its property and spend its money. The case cited does not support the contention of the defendant that the Virginia statute is unconstitutional because it does not afford to the defendant the opportunity to be heard in respect to the question of whether the public convenience or necessity requires the elimination of the existing grade crossing. Callaway, J., said:

"We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative officer or board *to carry out the definitely expressed will of the Legislature*, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carried a delegation of legislative power.

"But the power must not be so arbitrary in character as to transgress the 'due process clause' of the state or national Constitution. *It would be difficult to couch a stat-* [fol. 127] *ute in more general terms than those employed in the one we are considering.* Counsel for plaintiff are justified in saying that whether or not a hearing shall be ordered and the carrier afforded an opportunity to introduce testimony relative to the necessity or propriety of an order requiring construction, or whether the investigation shall be *ex parte*, is left entirely to the board itself. *The statute does not undertake, even in the most general terms, to prescribe the conditions under which the board may compel the carrier to construct a spur. It does not provide that the board may issue its order when reasonable public necessity requires it;* there is no indicated rule of decision. It does not require as a condition to the making of the order that the board shall give the carrier notice and a hearing; it does not contain even that procedural direction. On the contrary, it assumes to authorize the board only after such investigation *as they may deem necessary*, and under such rules and regulations as they may establish with reference thereto to compel common carriers to extend and construct commercial or industrial spurs. * * *

"When we conceive that the board's order to the carrier to construct the spur track is in effect *a taking of property*, for *it requires the carrier to use its property and spend its money* (State of Washington ex rel. R. & N. Co. vs. Fair-

child, 224 U. S. 510, 32 S. Ct. 535, 56 L. Ed. 863), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made we hold that notice and opportunity to be heard is indispensable. * * *

"While it is true, abstractly, that notice and opportunity for a hearing are not essential to the validity of legislative enactments, such legislation nevertheless may be invalid as violative of the Fourteenth Amendment because arbitrary, unjust, and unreasonable. A statute which undertakes to deprive a person of his property without notice and opportunity to be heard certainly is invalid. Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 970, 3 Interst. Com. R. 209.

"The Legislature itself may not deprive a person of his property without due process of law, and with reason quite as strong it cannot authorize its creature to do what it cannot do itself." (Italics ours.)

The opinion clearly shows that the court was influenced [fol. 128] by two facts: namely, (1) the conferring upon the Board of Railroad Commissioners of the power to order the construction of the spur track arbitrarily and without any indicated rule of decision; (2) that the board's order was a taking of property and this was true, as found by the Supreme Court of Montana, and also stated in State of Washington vs. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 868, which it cited in support of its statement that "the board's order to the carrier to construct the spur track is in effect a taking of property, for it requires the carrier to use its property and to spend its money", and where Mr. Justice Lamar, delivering the opinion of the court, said, in reference to an order requiring a railroad company to make a track connection:

"The commission's order requiring the Oregon Company to make a track connection was not a mere administrative regulation, but it was a taking of property, *since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid.* Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering

whether, in view of all the facts, the taking was arbitrary and unreasonable, or justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, *if the necessary result be to deprive him of his property without compensation.*' * * * So that, where the *taking* is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment." (Italics ours.)

Manifestly, Chicago, M. & St. P. Ry. Co. vs. Board of Railroad Commissioners, supra, is not controlling in the consideration of the questions involved in the case at bar.

The defendant, in referring to New York, etc., Railway Co. vs. Bristol, 151 U. S. 556, 38 L. Ed. 269; Chicago, etc.,

[fol. 129] Railway Co. vs. Nebraska, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481; and Erie Railway Co. vs. Public Utilities Commissioners, 254 U. S. 394, 65 L. Ed. 322, points out that the statutes in such cases provided for notice to or an opportunity to be heard by the railroad company before it should be required to eliminate grade crossings. It is true that the statutes involved in such cases did require such notice, and the courts in considering such questions and the contention that the statutes deprived the defendant of property without due process of law, referred to the fact that the statutes did provide for notice or an opportunity to be heard, but the fact that they did so is not to be taken as a holding that notice to or an opportunity to be heard was essential to due process of law.

While nearly all of the statutes involving the alteration or abolition of grade crossings, whenever in the opinion of the administrative body the public safety or convenience requires such alteration or abolition, provide for a hearing, yet there is no case which holds that notice of a hearing and an opportunity to be heard are absolutely necessary.

When the General Assembly conferred upon the State Highway Commissioner—who is an arm of the State—the function to require the elimination of an existing grade crossing and the substitution therefore of an overhead or underpass crossing, whenever such elimination and substitution in his opinion becomes necessary for the public safety or convenience, it had authority to prescribe the course to be pursued, and if it had required notice to be given to the railroad company, the State Highway Commissioner would have to comply with such requirement, but it has not so required, and it was not essential that it do so.

In State vs. Lichte, 226 Mo. 273, 126 S. W. 466, it was held that the fact that a statute, providing for the incorporation of villages by the county court on the petition of two-thirds of the taxable inhabitants of the village, did not provide for notice to persons whose lands are to be included did not deprive such persons of their property without due process of law. Valliant, C. J., said:

"Relator contends that section 6004, Rev. St. 1899, is void because it attempts to authorize the county courts to incorporate villages without giving notice to the parties whole lands are to be included in the corporation, thereby depriving them of their property without due process of law. * * * The state is not required to give notice when [fol. 130] it purposes to take action for the better government of its people, or when it will levy taxes. *The creation of a muncipal corporation is an act of state sovereignty; the corporation is created to aid the state in the exercise of its sovereign power, to preserve the lives, the health, the liberty of its people and the protection of their property*—it is an arm of the state. * * *. But in modern times, because the legislative department of the state government has no time to spend in making a special charter for every community that feels the need of a municipal government, and also for the sake of uniformity in such charters, it has with sanction of the Constitution passed general laws *delegating the government power to the courts, and directing how it shall be exercised.* * * * The grant of a franchise, whether to constitute a public or a private corporation, is an act of sovereignty that belongs primarily to the lawmaking department, and though transferred by the General Assembly to the judicial department by authority of the Constitution, yet it is not a judicial act, though when exercis-

ing it the court doubtless must act according to its own course of procedure as far as applicable. * * * Since the state acting through its legislative department could create a municipal corporation without giving notice to the owners of the property without violation of section 30, Art. 2 (Ann. St. 1906, p. 166), of the Constitution, which says: 'No person shall be deprived of life, liberty or property without due process of law', *the state can likewise do so through any other department of its government to which it may choose by its Constitution to delegate the power. When the General Assembly conferred this power on the county courts it had authority to prescribe the course to be pursued;* and, if it had required notice by publication or otherwise, the county court would have to comply with such requirement, *but it has not so required, and it was not required so to do.*" (Italics ours.)

I am of the opinion that the statute under consideration is not in contravention of the due process clause of article I, section 11 of the Constitution of Virginia, nor of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because it does not provide that prior to the making by the State Highway Commissioner of his requirement that a grade crossing be eliminated the railroad company shall be given an opportunity to be heard on the question of safety or convenience.

[fol. 131] The next question to be considered is whether there is anything in the Constitution of the United States or the Constitution of Virginia which prohibits the delegation to the State Highway Commissioner of the function to determine that the public safety or convenience requires the elimination of a particular grade crossing.

Such question, as far as the State Constitution is concerned, and the construction of the statute are matters of State laws as to which the Supreme Court of the United States will follow the decision of the State court.

Douglas vs. Noble, 261 U. S. 165, 67 L. Ed. 590, 592;
Welsh vs. Swasey, 214 U. S. 91, 53 L. Ed. 923;
Bradley vs. Richmond, 227 U. S. 477, 57 L. Ed. 603;
Mutual Film Corp. vs. Industrial Commission, 236 U. S. 230, 59 L. Ed. 552, 560;
New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305.

A state legislature may consistently with the Federal Constitution delegate to an administrative board or officer the function of determining a fact.

Douglas vs. Noble, 261 U. S. 165, 67 L. Ed. 590, 592;
Mutual Film Corp. vs. Industrial Commission, 236 U. S. 230, 59 L. Ed. 552, 560;
Reitz vs. Michigan, 188 U. S. 505, 47 L. Ed. 563;
Gundling vs. Chicago, 177 U. S. 183, 44 L. Ed. 725, 728;
New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305.

The General Assembly of Virginia possesses all legislative power not prohibited by express terms or by necessary implications by the State Constitution or the Constitution of the United States.

Moss vs. Tazewell, 112 Va. 878, 72 S. E. 945;
City of Roanoke vs. Elliott, 123 Va. 393, 406, 96 S. E. 819;
Albemarle Oil Co. vs. Morris, 138 Va. 1, 121 S. E. 60;
Kirkpatrick vs. Board of Supervisors, 146 Va. 113, 136 S. E. 186, 190;
Norfolk vs. Board, 109 Va. 353, 63 S. E. 987;
Shenandoah Lime Co. v. Governor, 115 Va. 865, 80 S. E. 753;
Breckenbridge vs. County School Board, 146 Va. 1, 135 S. E. 693.

[fol. 132] In determining whether an act of the legislature is forbidden by the State Constitution, it must be borne in mind that the Constitution is not a grant of power but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it had been taken away; that the legislature is practically *omnipotent* in the matter of legislation, except in so far as it is restrained by the Constitution expressly or by plain, or (as some of the cases express it) by necessary implications.

Pine vs. Commonwealth, 121 Va. 812, 93 S. E. 652;
See, also, Breckenbridge vs. County School Board, 146 Va. 1, 135 S. E. 693.

The mere enactment of a law is a legislative declaration of the necessary constitutional power which is entitled to

great respect from a co-ordinate department of the government; every act is presumably constitutional until the contrary is made to appear and all doubts on the subject are to be solved in favor of its validity.

Pine vs. Commonwealth, 121 Va. 812, 93 S. E. 652;
City of Roanoke vs. Elliott, 123 Va. 393, 96 S. E. 819.

It is a primary principle that in our system of government the legislative, executive and judicial departments must be kept separate and distinct.

Cooley's Const. Lim. (8th Ed.), p. 227;
Kamper vs. Hawkins, 1 Va. Cas. 19, 84;
Board vs. Duke, 113 Va. 94, 73 S. E. 456.

Article III of the Constitution of Virginia reads:

"Except as hereinafter provided, the legislative, executive and judicial departments shall be separate and distinct so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

The governmental powers that are divided into the legislative, executive, and judicial departments, and the exercise of which is forbidden to persons not properly belonging to [fol. 133] the particular department, are those so defined by the Constitution, or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the State and Federal Constitutions. All official duties, authority, and functions prescribed or contemplated by law are not necessarily governmental powers within the meaning of the constitutional provisions separating the powers of government into departments. The provisions of the Constitution relate to the division and exercise of the legislative, executive, and judicial powers of government, and not to the definition or declaration of such powers. The mandate is in effect that, except as expressly provided for in the Constitution, the legislative or lawmaking power, that is vested in the Senate and House of Representatives as the legislature, shall not be exercised by the Governor

or by the courts; the executive power conferred upon the Governor as chief magistrate shall not be exercised by the legislature or by the courts; and the judicial power that is vested in the courts shall not be exercised by the legislature or by the Governor. The Constitution does not forbid the performance of administrative duties by the Governor, the courts, or the legislature.

State vs. Duval Co., 76 Fla. 180, 79 So. 692, 697;
State vs. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639.

See, also:

12 C. J. 854; 6 R. C. L. 169;
Windham vs. State, 16 Ala. App. 383, 77 So. 963.

Birmingham Drainage Dist. vs. Chicago, B. & Q. R. Co., 274 Mo. 140, 202 S. W. 404; and dissenting opinion of Prentis, C. J., in Fugate vs. Weston, 156 Va. 107, 157 S. E. 736, 746, where the constitutional provision in respect to the separation of legislative, executive and judicial powers was considered.

Neither the Constitution of Virginia nor the common law defines the line of separation between the powers that shall be exercised directly by the General Assembly and those that may be indirectly exercised through delegated authority. Where the legislature has authority to provide a gov- [fol. 134] ernmental regulation and the organic law does not prescribe that it be afforded by direct legislative act, such regulation may be provided either directly by the General Assembly, or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is thereby violated. This principle is observed with reference to administrative boards and officers.

Taylor vs. Smith, 140 Va. 217, 124 S. E. 259;
Thompson vs. Smith, 155 Va. 367, 154 S. E. 579;
Mutual Film Corp. vs. Ohio Indus. Com., 236 U. S. 230, 59 L. Ed. 552;
City of Jacksonville vs. Bowden, 67 Fla. 171, 64 So. 769, 774;
State vs. Duval Co., 76 Fla. 180, 79 So. 692, 696;
Eckerson vs. City of Des Moines, 137 Iowa 452, 115 N. W. 177, 183.

In Eckerson vs. City of Des Moines, 137 Iowa 452, 115 N. W. 177, 183, Bishop, J., said:

"From this comes readily the conclusion that there was committed to the General Assembly, as part of the legislative authority vested in it, full and plenary power to select the agencies appropriate in its judgment to the purpose, and to clothe such agencies with powers to be exercised in manner and form as prescribed therefor. Indeed, this must be so. Inherent in the unrestricted authority to organize is the authority to prescribe powers within general constitutional limits, and to designate the officials upon whom shall rest the duty of carrying such powers into execution. * * * And all the authorities agree that, *in the absence of any constitutional restriction, it is within the province of the Legislature to clothe an officer or agency created by it with functions involving the exercise of powers executive, legislative, and judicial in character—one or all.* State vs. Barker, 116 Iowa 109 (89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222). So, also, the universal practice has been that way. As it is well known, the county courts of this state, when they existed, were not only authorized to perform judicial duties, but executive and legislative, as well. Under the general statutes now existing, mayors of cities and towns have conferred upon them powers and duties both executive and judicial; and, particularly in towns, the mayor, in virtue of his right to vote on all questions coming [fol. 135] before the council, constitutes in all strictness a part of the corporate legislative body. Boards of supervisors, city and township council, board of schools directors, township trustees, and various individual officers are directly charged with and are in the performance of powers and duties, now, administrative in character, and again judicial, etc. We shall not stop to further particularize. The statute book of this state, as of every state in the Union, is replete with illustrative examples." (Italics ours.)

It is a fundamental principle of our system of government that the right of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. It is the prerogative of the legislative branch of the government to determine and declare what the law

shall be, and the legislative branch may not delegate this function to executive or administrative officers. Thompson vs. Smith, 155 Va. 367, 154 S. E. 579.

But it must not be overlooked that legislatures are not continuous bodies. As a rule they are in session for only a few days each year, or every two years, as is the case in Virginia. Of necessity such bodies cannot undertake to determine all facts incident to the administration of the laws which they enact. Therefore, when it is said that the legislature may not delegate its powers, it is meant that it may not delegate the exercise of its discretion as to what the law shall be but not that it may not confer discretion in the administration of the law itself.

Thompson vs. Smith, 155 Va. 367, 154 S. E. 579;
Craig vs. O'Rear, 199 Ky. 553, 251 S. W. 821, 828;
In re Chapman, 166 U. S. 661, 41 L. Ed. 1154;
Port Royal Min. Co. vs. Hagood, 30 S. C. 519, 9 S. E. 686.

The principle that the rights of men are to be determined by the law itself and not by administrative officers does not mean, however, that no discretion can be left to administrative officers in administrating the law. Government could not be efficiently carried on if something could not be left to the judgment and discretion of administrative officers to accomplish in details what is authorized or required by law in general terms. This is particularly true where the discretion to be exercised relates to police regulations. But the reasonable discretion which may be vested in administrative officers is limited to a discretion in its [fol. 136] essence ministerial and not legislative, though it may be such as may be exercised by the legislature.

Thompson vs. Smith, 155 Va. 367, 154 S. E. 579;
People vs. Hawkinson, 324 Ill. 285, 155 N. E. 318.

Authority to perform functions that are not exclusive, but are administrative in their nature, may be by statute conferred upon other officials. State vs. Duval Co., 76 Fla. 180, 79 So. 692, 697.

There is a distinction between delegating power to make a law and conferring authority or discretion as to its execution. If a legislative act is clothed with all the forms of law and is complete in itself in form and substance, if the

officer, board, or commission to whom the authority is alleged to have been delegated is given no power to add to or to take away from the law as enacted, if nothing is left to discretion as to what shall constitute the form and substance of the statute, and if the act embodies a full and complete expression of the legislative will, matters which may be fairly regarded as relating to the administration and execution of the statute, even though involving discretion, do not constitute an unauthorized delegation of legislative authority.

Cooley's Const. Lim. (8th Ed.), p. 223;
6 Am. & Eng. Ency. Law (2d Ed.) 1029;
6 R. C. L. 165, 173;
12 C. J. 840;
Southern Pac. R. Co. vs. United States, 171 Fed. 360, 362;
Livesay vs. De Armond, 131 Ore. 563, 284 Pac. 166, 170.

The mere fact that a subordinate body is granted discretion in the exercise of a power conferred by law, does not necessarily demonstrate that the discretion conferred amounts to the use of a legislative power. Any power, other than a legislative one, which the legislature may exercise, it may delegate.

Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. Ed. 253;
United States vs. Grimaud, 220 U. S. 506, 55 L. Ed. 563;
Southern Pacific R. Co. vs. United States, 171 Fed. 360, 362;
Livesay vs. De Armond, 131 Ore. 563, 284 Pac. 166, 170.

[fol. 137] It necessarily follows from this that before a statute can be condemned as conferring legislative power upon an administrative body, it must be evident that the power conferred is legislative. Livesay vs. De Armond, 131 Ore. 563, 284 Pac. 166, 170.

The true test and distinction whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the statute law "is between the delegation of power to make the law which necessarily in-

volves a discretion as to what it shall be, and conferring authority or discretion to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made".

Judge Ranney, in Cincinnati, Wilmington & Zanesville R. R. Co. vs. Commissioners, 1 Ohio St. 77, quoted with approval in the following cases:

Marshall Field & Co. vs. Clarke, 143 U. S. 649, 36 L. Ed. 294, 310;
St. Louis Merchants Bridge Terminal Co. vs. Commissioners, 188 Fed. 191, 110 C. C. A. 63;
State vs. McCarthy, 5 Ala. App. 212, 59 So. 543;
Nall vs. Kelly, 120 Ark. 277;
State vs. Burdge, 95 Wis. 390, 70 N. W. 347;
State vs. Frear, 146 Wis. 291, 131 N. W. 832;
Winslow vs. Fleischner, 112 Ore. 23, 228 Pac. 101.

See also to the same effect:

Stuart's Exors. vs. Board of Sinking Fund Commissioners, 123 Va. 224, 228, 96 S. E. 239;
People vs. Reynolds, 5 Gilm. (Ill.) 1;
People vs. Walton, 314 Ill. 45, 145 N. E. 182;
Sheldon vs. Hoyne, 261 Ill. 222, 103 N. E. 1021;
Arms vs. Ayer, 192 Ill. 601, 61 N. E. 851;
People vs. Grand Trunk Western Ry. Co., 232 Ill. 292, 83 N. E. 839;
Craig vs. O'Rear, 199 Ky. 553, 251 S. W. 828, 831;
Estes vs. State Highway Commissioner, 235 Ky. 86, 29 S. W. (2d) 583, 586;
Bloxton vs. State Highway Commission, 225 Ky. 324, 8 S. W. (2d) 392;
Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716;
John Morrell & Co. vs. American Ry. Express Co., 45 S. D. 399, 187 N. W. 724, 725.

[fol. 138] In Port Royal Min. Co. vs. Hagood, 30 S. C. 519, 9 S. E. 686, 688, the court said:

"It is undoubtedly true that legislative power cannot be delegated; but it is not always easy to say what is and what is not legislative power, in the sense of the principle. The legislature is only in session for a short period of each year, and during the recess cannot attend to what might be called the business affairs of the state. From

the necessity of the case, as well as the character of the business itself, that must be performed by agents appointed for that purpose * * * While it is necessary that the law itself should be full and complete, as it comes from the proper lawmaking body, it may be, indeed must be, left to agents in one form or another to perform acts of executive administration which are in no sense legislative. * * * We think the view is well stated in Locke's Appeal, 72 Pa. St. 491 (13 Am. Rep. 716): 'Then the true distinction, I conceive, is this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.''

In accordance with this principle it is held that it is not an objection to the law that it confers authority or discretion as to the executon of it.

People vs. Walton, 314 Ill. 45, 145, N. E. 182;
Arms vs. Ayer, 192 Ill. 601, 61 N. E. 851;
People vs. Grand Trunk Western Ry. Co., 232 Ill. 292, 83 N. E. 839.

In order to justify the courts in declaring invalid, as a delegation of legislative power, a statute conferring particular duties or authority upon officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power or duty appertaining exclusively to the legislative department under Article III of the Constitution, and the conferring of it is unwarranted by other provisions of the Constitution.

[fol. 139] City of Roanoke vs. Elliott, 123 Va. 393, 406, 96 S. E. 819;
State vs. Duvall County, 76 Fla. 180, 79 So. 692, 696;
State vs. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, *47 So. 969,* 23 L. R. A. (N. S.) 639.

The function conferred on the State Highway Commissioner to require the elimination of an existing grade crossing and the substitution therefor of an overhead or underpass crossing whenever in his opinion the public safety and/or convenience so requires, should be construed as an administrative duty rather than as a governmental power.

In State vs. Duvall County, 76 Fla. 180, 79 So. 692, 697, the court said:

"Where a duly enacted statute confers upon officials authority that is not in its nature exclusively and purely a legislative, executive, or judicial power, and it can fairly be done to accomplish a valid legislative purpose, such authority may be construed *as an administrative duty rather than as a governmental power.*" (Italics ours.)

But the delegation to the State Highway Commissioner of the function to order the substitution for a grade crossing of one not at grade is not the delegation of legislative power to an administrative body, but the function conferred is purely administrative or quasi executive in character and nature.

Chicago, M. & St. P. R. Co. vs. Lake County, 287 Ill. 337, 122 N. E. 526;
Stevens vs. Chicago, B. & Q. R. Co., 303 Ill. 49, 135 N. E. 68;
City of Milwaukee vs. Railroad Commission of Wisconsin, 162 Wis. 127, 155 N. W. 948;
State vs. Stephenson, 164 Wis. 569, 161 N. W. 1, 4.

In Chicago, M. & St. P. R. Co. vs. Lake County, 287 Ill. 337, 122 N. E. 526, 528, the court said:

"A railroad is a public utility, and the state may, in the exercise of its police power, and it is its duty where the public safety demands it, require the separation of grade crossings for the preservation of human life and the protection of property. The power to determine whether a [fol. 140] particular grade crossing is so dangerous to life and property of the public as to require a separate — *may be conferred on an administrative body, and is not a delegation of legislative authority.*" (Italics ours.)

See also Stevens vs. Chicago, B. & Q. R. Co., 303 Ill. 49, 135 N. E. 68.

In City of Milwaukee vs. Railroad Commission of Wisconsin, 162 Wis. 127, 155 N. W. 948, it was held that a statute authorizing the railroad commission to order the substitution for a grade crossing of one not at grade where public safety requires it, and providing that it shall fix the proportion of the cost to be paid by railroad and municipalities in interest, is constitutional, being within the police power of the State, and that such statute is not an unlawful delegation of legislative power to an administrative body, Winslow, C. J., said:

"The time has gone by when it can be successfully claimed that such a law unlawfully delegates legislative power to an administrative body. The Legislature has exercised the legislative function by declaring that unsafe crossings shall be made safe; *it can properly delegate to an administrative board the power to ascertain the crossings which are in fact unsafe, and to prescribe the manner of making them safe.* If this could not be done, the police power would be unable to cope with many of the most serious problems of modern life." (Italics ours.)

In State vs. Stevenson, 164 Wis. 569, 161 N. W. 1, 4, the court said:

"It is asserted that the statute improperly confers legislative powers on the State Highway Commission. Stress is placed on the claim that *the powers conferred*, authorizing the Commission to find the fact *of the public necessity* for a bridge at the place in question, to locate the same, to determine the character and kind of bridge adapted to the location, and to estimate the cost thereof, *are legislative powers*, which cannot de delegated. *It is manifest that all of these duties are either purely administrative or quasi executive in character and natures.* Under repeated decisions of this court such duties can properly be delegated to appropriate state agencies." (Italics ours.)

[fol. 141] The power of the General Assembly to delegate to an administrative body or officer of the State the power to determine certain executive or administrative

questions is recognized by the decisions of the Supreme Court of Appeals of Virginia.

Stuart's Executors vs. Board of Sinking Fund Com'rs, 123 Va. 224, 96 S. E. 239;
Thompson vs. Smith, 155 Va. 367, 154 S. E. 579.

In Stuart's Executors vs. Board of Sinking Fund Com'rs, supra, there was involved the validity of a statute providing for the presentation to the Board of Sinking Fund Commissioners for funding of any bonds, coupons or other obligations on which it was claimed that the Commonwealth of Virginia was liable by reason of having guaranteed the payment of the principal sum or interest, and which contained the provision that the Commissioners should not interpose the technical plea of the statute of limitations either as to the principal or interest of the alleged obligations "unless in the judgment of the Board it was proper and necessary to do so to protect the Commonwealth from the payment of an unjust and inequitable demand, for which the Commonwealth might otherwise be held liable". It was contended that the statute was unconstitutional, for the reason that it delegated to an administrative board, the Board of Sinking Fund Commissioners, legislative and judicial powers, Kelly, J., in holding that the statute was not unconstitutional as the delegation of legislative and judicial functions to an administrative body, said:

"The contention is that it was not competent for the legislature to leave it to the Board to determine in given cases the justice and equity of the demands asserted under the statute, but should either have determined that question for itself or have left it to the court upon which the jurisdiction to hear and determine the cause was conferred. In our view of the statute, however, the legislature has in terms waived the statute of limitations, subject only to the existence of certain facts and circumstances peculiar to the cases that might arise, and the provisions of the statute in this respect seem to us practical, just and lawful. The case appears to fall within the reasoning of the opinion in Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716."

[fol. 142] See for quotation from Locke's Appeal, Port Royal Min. Co. vs. Hapgood, supra.

As has heretofore been seen, a railroad company has no inherent right to have its railroad cross at a grade a public highway or street, and under its police power the State may require it, at its sole expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, even though newly laid out, over its tracks or an underpass to carry its tracks over such highways.

A consideration of the power of the State to exercise the police power of the State would seem to be justified.

The police power is but another name for the power of government; it is an attribute of sovereignty or rather it is a sovereignty itself and it is inherent to the States of the Union and is not a grant derived from or under a written constitution. Subject to constitutional limitations, a State legislature is authorized to pass measures for the general walfare of the people of the State in the exercise of the police power and is itself the judge of the necessity or expediency of the means adopted.

Kirkpatrick vs. Board of Supervisors, 146 Va. 113, 136 S. E. 186;
Ex Parte Guerra, 94 Vermont 1, 110 Atl. 224.

The means adopted by the legislature in the exercise of the police power, so long as they have an ascertainable relevancy to the object, are within the scope of that power, and whether the end justifies the means is exclusively for the legislative discretion, and whether the means bear a pertinent and reasonable relation to the end may be looked into by the courts, so far only as to determine the fact of pertinency and reasonableness, and the courts will not declare an act unconstitutional except when the means adopted are manifestly unreasonable or bear no logical relation to the object of the legislation.

Purity Extract Co. vs. Lynch, 226 U. S. 192, 57 L. Ed. 184;
Pine vs. Commonwealth, 121 Va. 812, 93 S. E. 652;
State Racing Commission vs. Latonia Agricultural Ass'n, 136, Ky. 173, 123 S. W. 681.

The State is primarily the judge of regulations required [fol. 143] in the interest of public safety and welfare and its police statutes may only be declared unconstitutional

where they are a-bitrary or unreasonable attempts to exercise the authority vested in the State in the public interest.

New York vs. Van DeCarr, 199 U. S. 552, 50 L. Ed. 305;
Graves vs. Minnesota, 272 U. S. 425, 428, 71 L. Ed. 331, 334;
Great Northern R. Co. vs. Minnesota, 246 U. S. 434, 439, 62 L. Ed. 817;
Gitlow vs. New York, 268 U. S. 652, 668, 69 L. Ed. 1138, 1146;
Pine vs. Commonwealth, 121 Va. 812, 93 S. E. 652.
See, also, Cooley's Const. Lim. (8th Ed.), p. 1228.

A direct exercise by the General Assembly of the police power is in accordance with immemorial governmental usage. But the subject matter may be such that only a general scheme or policy can with advantage be laid down by the General Assembly; and the working out of the policy indicated may be left to the discretion of other officers or tribunals. See

New York vs. Van DeCarr, 199 U. S. 552, 50 L. Ed. 305;
Field vs. Clark, 143 U. S. 649, 36 L. Ed. 294;
Butterfield vs. Stranahan, 192 U. S. 470, 48 L. Ed. 525;
Union Bridge Co. vs. United States, 204 U. S. 364, 51 L. Ed. 523;
St. Louis, Iron Mountain & Southern Ry. Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061;
First Nat. Bank vs. Union Trust Co., 244 U. S. 416, 61 L. Ed. 1233;
Arver vs. United States, 245 U. S. 366, 62 L. Ed. 349;
Interstate Commerce Com. vs. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729;
State vs. Duval Co., 76 Fla. 180, 79 So. 692, 697.

It is settled by numerous decisions that the legislature may, in the exercise of the police power of the State, create subordinate bodies or officers and delegate to them the police power and the exercise of such delegated power by such boards, officers, or other agencies will not be inter-

fered with by the courts except where the exercise of the power is arbitrary, unreasonable or oppressive.

[fol. 144] Thompson vs. Smith, 155 Va. 367, 154 S. E. 579;

People vs. Robertson, 302 Ill. 422, 134 N. E. 815, 817;

Downs vs. Swann, 111 Md. 53, 73 Atl. 653;

New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305.

In Downs vs. Swann, 111 Md. 53, 72 Atl. 653, it was said:

"It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld."

In People vs. Robertson, 302 Ill. 422, 134 N. E. 815, 817, the court said:

"The legislature may, in the exercise of the police power of the state, create ministerial boards, with power to prescribe rules and impose penalties for their violation and provide for the collection of such penalties, and the exercise of this power by the legislature is not a delegation of legislative power. The legislature has the authority to exercise its police powers by general law, *and to confer upon boards and other agencies authority and discretion to execute these laws.*" (Italics ours.)

The Constitution of Virginia, instead of restricting the power of the General Assembly to confer upon the State Highway Commissioner the power to determine whether the public safety or convenience requires the elimination of a particular grade crossing, seems to expressly confer upon it such power.

Section 164 of the Constitution of Virginia reads:

"The right of the Commonwealth, *through such instrumentalities as it may select,* to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor shall never be surrendered or abridged." (Italics ours.).

This section, when construed with Section 159 of the Constitution, clearly authorizes the General Assembly, whose power is only restricted by the Federal or State constitutions, to delegate to the State Highway Commissioner the power in question.

[fol. 145] The delegation by a statute to the State Highway Commissioner of the power to determine the necessity for condemnation of land for road purposes and the making of his decision conclusive and not subject to review by the courts, has been upheld and a hearing on the necessity and expediency of taking lands for such purposes is not essential to due process under the Fourteenth Amendment.

State Highway Commissioner vs. Yorktown Ice & Storage Corp., 152 Va. 559, 147 S. E. 239;
State Highway Commissioner vs. Kreger, 128 Va. 203, 105 S. E. 217.

See also Bragg vs. Weaver, 251 U. S. 57, 58, 64 L. Ed. 135.

In State Highway Commissioner vs. Yorktown Ice & Storage Corp., 152 Va. 559, 147 S. E. 239, West, J., delivering the opinion of the court, said:

"Section 1969-j, Code 1924, gives the chairman of the Commission the power of eminent domain for the purpose of 'construction, reconstructions, alteration, maintenance and repair', and, in addition thereto for 'all purposes incident there'. *He may, under the statute, determine the necessity for the condemnation, and his decision as to such necessity is not subject to review by the courts.*

"In Bragg vs. Weaver, 251 U. S. 57, 58, 40 Sup. Ct. 62, 63, (64 L. Ed. 135); the court said: 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. *They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the case under the 14th Amendment'.*"

"The doctrine has been approved by this court in State Highway Commissioner vs. Kreger, 128 Va. 203, 105 S. E. 217, where this is said: 'And the statute not submitting it to the courts as a judicial question, the necessity or expediency of the location, is a legislative question, the deci-

sion of which, without judicial review, has been delegated [fol. 146] to the State Highway Commission by the statute * * * under consideration.'" (Italics ours.)

If the power to determine the necessity for such condemnation can be constitutionally delegated to the State Highway Commissioner, by analogy it would seem that it was proper for the General Assembly to delegate to him the power to determine whether the public safety and/or convenience requires the elimination of a particular grade crossing and the substitution therefor of an overhead or an underpass crossing.

By the weight of authority and upon principle there seems to be no ground for the contention that the State in the exercise of its police powers cannot constitutionally delegate to an administrative board or office the power to determine the facts in a particular case unless, prior to such determination, notice and opportunity for hearing be required to be given to the person or corporation affected by the application of the police power, when the question involved is an administrative, legislative or an executive one and not a judicial one.

A study of the authorities seems to justify the conclusion that the fact that the statute in question delegates to the State Highway Commissioner the function to require the elimination of a grade crossing and the substitution therefor of an overhead or underpass crossing, as the case may be, whenever in his opinion the public safety or convenience so requires, does not establish the unconstitutionality of the act in question, for the reason that the discretion whether the public necessity and convenience requires the elimination of the grade crossing in question is essentially an administrative act and does not give the State Highway Commissioner any authority to say what the law shall be.

I am of the opinion, therefore, that there is nothing in the Constitution of Virginia which prohibits the delegation by the General Assembly to the State Highway Commissioner of the function to require a railroad company to eliminate a particular grade crossing, and that such a statute is not open to objection because it delegates to such officer that function.

Having reached the conclusion that in the exercise of its police power the General Assembly had the power to confer

upon the State Highway Commissioner the administrative function of requiring the elimination of grade crossings, it becomes necessary to consider whether or not the function has been validly conferred.

The legislative function to determine and declare what [fol. 147] the laws shall be cannot be delegated to executive or administrative officers. Thompson vs. Smith, 155 Va. 367, 154 S. E. 579.

In a well considered opinion, Mr. Justice Epes said in Thompson vs. Smith, supra:

"In principle, legislation and administration are quite distinct powers; but in practical application the line which separates their exercise is not clearly marked or easily defined. However, in their definition in practical application lies the difference between government by legislation and government by bureaucracy, which, though contrary to the genius of our government, some courts have gone far towards sustaining.

"The decisions of the various courts, and sometimes of the same court, are in conflict as to what constitutes a delegation of legislative power to administrative officers and bureaus. The majority of the cases lay down the rule that statutes or ordinances vesting discretion in administrative officers and bureaus *must lay down* rules and tests to guide and control them in the exercise of the discretion granted in order to be valid; but several courts apply the rule with varying degress of strictness. Other cases go so far in sustaining, *especially in cases involving police regulations*, grants of discretionary power to administrative officers and bureaus without prescribing any definite rule or specified conditions to which the officers must conform, as, in effect, to substitute for government by legislation, government by administrative officers and bureaus." (Italics ours.)

See, also Mutual Film Corp vs. Ohio Industrial Commission, 236 U. S. 230, 59 L. Ed. 552.

There is a distinction to be noted between the power of the State to regulate the exercise of inherent or common rights which men do not surrender by entering into organized society and the power to regulate an act where the

power exists to prohibit the doing of the act together. Inherent rights are briefly summarized in general terms in section 1 of the Constitution of Virginia, as follows:

"That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posferity, namely, the enjoyment of [fol. 148] life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

They embrace all business that are legitimate in character and are of such a nature as to indicate that they are inherent in the individual claiming them and also the right to use property as the owner sees fit so long as the rights of others are not infringed upon. The exercise of a common or inherent right, the State, may under its police power, regulate in the interest of the pulic safety and welfare; but it may not arbitrarily or unreasonably prohibit or restrict it, nor may it permit one to exercise it and refuse to permit another of like qualifications, under like conditions and circumstances, to exercise it. But where the power exists to prohibit the doing of an act altogether, the power of the State is broader, and there necessarily follows "the power to permit the doing of the act upon any condition, or subject to any regulation, however arbitrary or capricious it may be as the greater power includes the less, and the State may lawfully delegate to executive or administrative officers an uncontrolled and arbitrary discretion as to granting or revoking permits or licenses to do such acts." This distinction, elementary and fundamental in character, is recognized by the authorities.

Thompson vs. Smith, supra;
Taylor vs. Smith, 140 Va. 217, 124 S. E. 259, 263;
See, also, Gundling vs. Chicago, 177 U. S. 183, 44 L. Ed. 725;
Angelopoulos vs. Bottorff, 76 Cal. App. 621, 245 Pac. 447;
Cutrona vs. Mayor and Council of Wilmington, 14 Del. Ch. 208, 124 Atl. 658, (affd. 14 Del. Ch. 434, 127 Atl. 421);
State vs. Moorer, 152 S. S. 455, 150 S. E. 269;

Hadfield vs. Lundin, 98 Wash. 657, 168 Pac. 516;
State vs. Superior Court, 113 Wash. 296, 193 Pac. 845, 12 A. L. R. 1428;
Ex Parte Dickey, 76 W. Va. 576, 85 S. E. 781, where this distinction is stated.

In State v. Moorer, 152 S. C. 455, 150 S. F. 269, this distinction was pointed out. Three propositions were being considered, the third of which was that the legislature "cannot vest arbitrary discretion in any officer or body, but must prescribe some rule of action by which the discretion shall be controlled." Stabler, J., delivering the opinion of the court, said:

[fol. 149] "To support the third proposition, reliance is placed especially upon the case of Makris vs. Superior Court, 113 Wash. 296, 193 P. 845, 847, 12 A. L. R. 1428. That case, however, and numerous cases like it, *relate to the regulation of the exercise of man's natural rights and simply mean that the exercise of such rights shall not be left to the uncontrolled discretion of any officer or board.* The opinion itself, as shown in the proposed opinion here, lays down the rule which forms the basis of the decision to be that 'it is sufficient to render a law or ordinance void in the light of these constitution guaranties, if the prescribed manner of administering such law or ordinance results in leaving the question of the propriety of *issuing, withholding, or revoking a license to conduct an ordinary lawful business,* and thus the question of who may not engage in such business, to the decision of any officer or set of officers, uncontrolled by any prescribed rule of action.'

"The note to this case at page 1436 of A. L. R., * * * specifically recognizes that the point involved is whether a statute or ordinance which *vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc.,* in public *officials, without prescribing a uniform rule of action,* is unconstitutional and void." (Italics ours.)

This distinction is also pointed out in Cutrona vs. Mayor and Council of Wilmington, 14 Del. 208, 124 Atl. 658 (aff'd 14 Del. Ch. 434, 127 Atl. 421), where the chancellor said:

"As before observed, the conducting of a business upon the streets of a city is not a thing to which any one can

assert an inherent right. This is the pivotal proposition upon which the complainant's case turns. *The right of domain over one's own property, to use it as he sees fit so long as the rights of others are not infringed upon, is a right which not even the legislative power of the state can take from the individual.* With respect to such proprietary interest the extent of the state's power is that of regulation, and such regulation must be of a kind that operates impartially and alike upon all persons similarly situated. *Regulation in matters of this kind can never extend to the point of bestowing upon any official or officials the power to permit or deny, according as whim, fancy or favoritism may suggest, the enjoyment of the right by the individual.* The equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of [fol. 150] the United States denounces all attempts to subject the property rights of individuals to the unrestrained discretion or control of administering officials, *except in those special instances where the police power of the state may within the appropriate field reserved to it interpose its restraining arm.* In Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, the decision was that the right of a person to use his building for the purpose of carrying on a laundry business in the city of San Francisco could not be made to depend on the unrestrained will of the city's board of supervisors. The laundry business being of such character as calls for no special treatment similar to that, for instance, which the business of selling intoxicating liquors renders necessary, it was held that regulation was the limit of legitimate power and that such regulation must be equal and impartial in its application. *Right to conduct the business could not be left to be granted ex gratia.* * * * The doctrine referred to is applied to all businesses which are legitimate in character and of such nature as to indicate that the right to pursue them is inherent in the individual. Accordingly judicial countenance is denied to all attempts to require the citizen to secure the consent of officials, who may give or withhold at their pleasure, before he may do such things with his own property as the following: Build on his own land, * * *; keep horses, etc., on his own premises, * * *; set up steam engines, * * *; or store petroleum thereon, * * *; use a building for

storing, sorting, etc., rags, * * *; or establish a cemetery on his own lot, * * *. *All such cases concern themselves with the inherent right of the individual to assert his proprietary interest over his own possessions.*

"*In the instant case, however, no such situation is presented.* This is for the reason, as already pointed out, that no person has any proprietary interest in the city streets. He has no inherent right to make of the streets a place for the transaction of his private business. Accordingly the case of Yick Wo vs. Hopkins, supra, and all cases following its doctrine have no application here. Nor have those cases any application which deny to a city the power to commit to the unrestrained will of officials the right of private citizens to parade over the streets. * * * Whether cases of this class be correct in principle or not, I need not pause to consider. Conceding their correctness, they are inapplicable here for the manifest reason that they in no wise involve the use of the streets for carrying on a business.

[fol. 151] "*This case comes down to the proposition of whether it is competent for the city of Wilmington to intrust to an unregulated discretion the right of an individual to use its streets as a place for the carrying on of his private business. After giving to the question the fullest consideration I can, I am of the opinion that it is.* Whenever the city authorities have power to prohibit a thing, they may as a condition for its enjoyment require that the consent of its properly designated officials shall first be obtained." (Italics ours.)

In regulating the exercise of a common or inherent right, "the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply".

Thompson vs. Smith, supra, quoting with approval, Mutual Film Corp. vs. Ohio Industrial Commission, 236 U. S. 230, 59 L. Ed. 552.

But mere matters of detail within the policy and the legal principles and standards established by the statute may properly be left to administrative discretion; for the de-

termination of such matters of details is more essentially ministerial than legislative.

Thompson vs. Smith, supra.

A statute may use general terms in defining the declared policy of the law and in fixing the legal principles which are to control the discretion of administrative officers in administering the law, where the technical knowledge or sense and experience of men render the terms reasonably certain, and an administrative officer or bureau may be invested with the power to ascertain and determine whether qualifications, facts, or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed have been complied with in accordance with the generally accepted meaning of the words.

Thompson vs. Smith, supra, citing Mutual Film Corp. vs. Ohio Industrial Commission, 236 U. S. 230, 95 L. Ed. 552;

Yee Bow vs. Cleveland, 99 Ohio St. 269, 124 S. E. 132, 12 A. L. R. 1424;

[fol. 152] Block vs. City of Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219.

The importance of the distinction between the power of the State to regulate the exercise of an inherent or common right and an act which the State has the power to prohibit the doing of altogether becomes of importance in the consideration of the case at bar when it is borne in mind that the State in the exercise of its police power may by statute require all railroad companies at their own and sole expense to eliminate all grade crossings and to substitute therefor overhead or underpass crossings as the case may be. It is conceded by the defendants in its brief that when such regulation "is directly imposed by the legislature in its own statute—a statute of general application, * * * prior notice and right to a particular hearing according to forms of law is not necessary to due process". It is also conceded that where the legislature has delegated to a city council the power to require the elimination of grade crossings, the city council may by ordinance require the elimination of a particular grade crossing where the public safety or convenience requires such elimination. Since the State would have in any proper case the power to require the

elimination of grade crossings, it may delegate to an administrative officer the function to determine whether the public safety or convenience requires the elimination of a particular grade crossing, and the present problem narrows itself down to a determination of whether or not the method which it has adopted confers upon such administrative officer unreasonable powers, and herein the controlling consideration is not that the function conferred may be unreasonably or oppressively exercised, for every presumption is that it will be honestly and reasonably exercised.

It is settled in Virginia that the State may in the execution of its police power, invest its administrative officers with a reasonable discretion in the performance of duties devolved upon them to that end, whenever it is necessary for the safety and welfare of the public, but the reasonable discretion which may be vested in its administrative officers is limited to a discretion in its essence ministerial and not legislative, though it may be such as may be exercised by the legislature.

Thompson vs. Smith, supra;
Taylor vs. Smith, 140 Va. 217, 124 S. E. 259.

[fol. 153] The decisions of the Supreme Court of the United States lay down the rule that a state or city may vest in its officials broad discretion in matters affecting the application and enforcement of health laws, and other laws passed in the exercise of the police power of the state where the public welfare or convenience is involved.

Zucht vs. King, 260 U. S. 174, 67 L. Ed. 194;
Jacobson vs. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;
Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358, 54 L. Ed. 515.

In Zucht vs. King, 260 U. S. 174, 67 L. Ed. 194, there was involved a proceeding by injunction to recover damages against certain public officials for the exclusion of the petitioner from the public schools, and to enjoin them from so excluding her and to compel them to admit her to school. The ordinances of the city provided that no child or other person should attend a public school or other place of education without having first presented a certificate of vaccination, and purporting to act under such or-

dinances the public officials excluded her from a public school because she did not have the required certificate and refused to submit to vaccination and also caused her to be excluded from a private school. Mr. Justice Brandeis, delivering the opinion of the court, said:

"Long before this suit was instituted, Jacobson vs. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, had settled that it is within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358, 54 L. Ed. 515, 30 Sup. Ct. Rep. 301. And still others had settled that *the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.* New York ex rel. Lieberman vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305, 26 Sup. Ct. Rep. 144. * * * In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health." (Italics ours.)

[fol. 154] The reports are full of cases upholding the power of the legislature to confer on boards, bureaus, commissions and administrative officers the power to carry out the legislative will, and I shall not attempt even an incomplete collation of these authorities but shall content myself with citing a few typical cases, for the line which separates the exercise of administrative and legislative powers is best recognized in illustrations.

In Mutual Film Corp. vs. Industrial Com., 236 U. S. 230, 59 L. Ed. 552, 560, it was held that legislative power is not unlawfully delegated by the provisions of a statute for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition motion picture films which are to be publicly exhibited and displayed

in the state, and is to pass and approve "only such films as are in the judgment and discretion of the board of censors, of a moral, educational, or amusing and harmless character". In considering the contention that the statute was a delegation of legislative power and therefore void, Mr. Justice McKenna said:

"Undoubtedly *the legislature must declare the policy of the law and fix the legal principle which are to control* in given cases; *but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply.* If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution. The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from these extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film', while others might be approved without question. But the statute by its provisions guards against such variant judgment, and *its terms,* like other general terms, *get precision from the sense and experience of men,* and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases. [fol. 155] (Citing cases.) If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible." (Italics ours.)

In Block vs. City of Chicago, 239 Ill. 251, 87 N. E. 1011, 1015, it was held that a city ordinance, requiring one operating a moving picture show to obtain a permit from the chief of police, whose duty it is made to refuse the permit if the films required to be submitted to his inspection depict "immoral or obscene" pictures, is not invalid because the

chief is given the power to determine the question of fact whether the pictures are "immoral or obscene" and because it did not give the applicant an opportunity to be heard in court on such question. The court said:

"It is also argued that the ordinance is void because it delegates legislative and judicial powers to the chief of police by giving him the power to determine whether a picture or series of pictures is immoral or obscene, and not giving to the applicant for a p-rmit a day in court for the determination of the question whether the picture or series of pictures is immoral or obscene. *It is true that a legislative body cannot divest itself of its proper function to determine what the law shall be, but it may authorize others to do those things which it might properly but cannot understandingly or advantageously do.* * * * Government could not be carried on if nothing could be left to the judgment and discretion of administrative of-cers, * * * . There are numerous facts of that kind which must be left to administrative officers and the ordinance is not invalid because the chief of police must determine the question of fact whether a picture or series of pictures is immoral or obscene.

"But it is said that, conceding the power of the legislative body to authorize an administrative officer to determine the question, the ordinance fixes no standard by which it is to be determined. Manifestly it would be impossible to specify in an ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance. * * * The average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him. There is as great diversity of [fol. 156] opinion as to what constitutes good moral character, but it is beyond question that an officer authorized to grant a license to keep a dramshop may determine whether the applicant has a good moral character, and there has been no ground for complaint that the power has been wrongfully or oppressively exercised against applicants. It is presumed that the chief of police, or the mayor, in case of an appeal to him, will perform his duty with

reasonable intelligence and in accordance with the generally accepted meaning of the words. If there should be an abuse of power on the part of either the chief of police or the mayor, the ordinance does not prev-nt an application to a court to comp-l either officer to perform his duty and issue a permit for a picture which is not immoral or obscene." (Italics ours.)

The following statutes or ordinances delegating power to administrative officers or bodies have been upheld: A statute providing that the charter board shall refuse a bank charter, if it shall determine that it is not required by the public necessity of the business in a community, Schaake vs. Dolley, 85 Kan. 598; 118 Pac. 80, 86; a statute directing the bank examiner to ascertain whether the character, responsibility and general fitness of bank incorporators are such as to command confidence and warrant belief that the business of the proposed corporation will be honestly and efficiently conducted, and whether public confidence and benefit will be promoted by allowing the proposed corporation to engage in business, Weer vs. Page, 155 Md. 86, 141 Atl. 518; a statute delegating to the State Board of Stock Inspection Commissioners authority to determine when an infectious or contagious disease exists among domestic animals, or when such animals have been exposed to such disease, and to authorize the board to compel such treatment as will, in its judgment, prevent the spread of such disease, People vs. Lange, 48 Colo. 428, 110 Pac. 68, 70; a statute providing that the work of eradication of cattle tick shall be taken up in any county, or any part of a county, when the Live Stock Sanitary Board shall deem best, State vs. McCarty, 5 Ala. App. 212, 59 So. 543; a statute providing for the control and eradication of apple rust, which provides that any cedar tree growing within a radius of three miles of an apple orchard is a public nuisance, and that upon request, in writing, of ten or more reputable freeholders of any county, the State Entomologist shall ascertain if any red cedar tree in the locality is the source of or the host plant for the disease commonly known as "rust of the apple", and [fol. 157] if he finds the cedar so infected within the prescribed area, he shall require, in writing, the owner of such tree to destroy it, stating briefly the facts which necessitate the destruction and calling attention to the law under which the requirement is made, and that upon the failure of the

owner to comply with the order, the State Entomologist shall cause the tree to be cut down and destroyed. Lemon vs. Rumsey, 108 W. Va. 242, 150 S. E. 725, 726; a statute delegating to the State Board of Forestry the power to fix the charges for inspection of roadside trees, and to determine the conditions under which permits for cutting and trimming them shall be issued, Chesapeake & Potomac Telephone Co. vs. Board of Forestry, 125 Md. 666, 94 Atl. 322, 324, holding that such statute is an exercise of the police power of the State, and that there "is no constitutional objection to the delegaion of such a function to a public board or commission, serving as a governmental agency"; a statute creating a State Co-operative Board of Forestry, giving it authority to determine policies and make and enforce rules and regulations for the administration of the statute, and providing for the appointment of a State Forester to execute the law, and permitting him to determine whether certain materials on land constitutes a fire menace to life and/or property, Chambers vs. McCollum, 47 Idaho 74, 272 Pac. 707, 109, it being said that "the legislature may delegate to executive or administrative officers the power to determine certain facts, or the happening of a certain contingency, on which the statute, is by its terms, made to depend"; a statute empowering the Department of Agriculture to designate what waters of the State shall be used as fish preserves, it being said that it would be practically impossible for the legislature to determine what waters should, and should not, be used as fish preserves, and that the statute conferred but administrative discretion and did not confer legislative power, People vs. Walton, 314 Ill. 45, 145 N. E. 182; a statute regulating the racing of running horses and to establish a State Racing Commission, and giving the commission power to prescribe regulations under which running races should be conducted, and forbidding the holding of races except by a corporation or association licensed by the commission, State Racing Commission vs. Latonia Agricultural Ass'n, 13 Ky. 173, 128 S. W. 681; a statute providing for the establishment of two normal schools, and which created a commission, authorized and empowered to establish such schools by selecting the sites and providing suitable buildings, properly equipped, at the expense of the towns fur-
[fol. 158] nishing the sites, Craig vs. O'Rear, 199 Ky. 553,

251 S. W. 828, 831; a statute authorizing the State Highway Commission to find the fact of the public necessity for a bridge, to locate the same, to determine the kind and character of the bridge adapted to the location, and to estimate the cost thereof, State vs. Stevenson, 164 Wis. 569, 161 N. W. 1, the court saying: "It is manifest that all of these duties are either purely administrative or quasi-executive in character and nature;" a statute creating the Industrial Welfare Commission and authorizing it to fix minimum wages for women, Spokane Hotel Co. vs. Younger, 113 Wash. 359, 194 Pac. 595; an ordinance requiring the written permission of the mayor or president of the city council, or in his absence, a member of the council, before any person shall move a building on the streets, Wilson vs. Eureka City, 173 U. S. 32, 43 L. Ed. 603, reviewing many analogous cases; a statute to regulate hotels, and providing that it is not applicable to hotels "of approved fireproof construction", and declaring that "approved sanitary conditions" shall be maintained and that cesspools and privies shall be properly cleaned and disinfected as often as necessary to maintain them in such sanitary condition, and conferring on the hotel inspector authority to determine whether a hotel is of approved fireproof construction and whether it is maintained in a sanitary condition, Hubbell vs. Higgins, 148 Iowa 36, 126 N. W. 914, 917; a statute regulating the civil service and providing that the civil service commissioners shall include in the exempt class only those offices as to which they in fact find that competitive or non-competitive examinations are impracticable on account of the temporary duration of the employment or for other special reasons, State vs. Frear, 146 Wis. 291, 131 N. W. 832; a statute granting discretion to the board of dental examiners to determine in granting license to practice dentistry what constitutes "a reputable dental college", Ex Parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; a statute providing for revocation of a physician's license for fraud in obtaining the certificate, the commission of criminal abortion, the conviction of a felony involving moral turpitude, or chronic inebriety, and for other "grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public". Forman vs. State Board of Health, 157 Ky. 123, 162 S. W. 796, 798; a statu-e requiring the

health commissioner in granting a permit to conduct a laundry to ascertain whether the sanitary and drainage arrangements were sufficient to protect the public health and whether adequate ventilation, plumbing, and draining [fol. 159] facilities had been provided, Yee Bow vs. Cleveland, 99 Ohio St. 269, 124 N. E. 132, 12 A. L. R. 1424; an ordinance empowering officers of the police department "to direct all traffic in accordance with the provisions of this ordinance, or in emergencies as public safety or convenience may require", City of Chicago vs. Marriotto, 332 Ill. 44, 163 N. E. 369, 60 A. L. R. 501; a statute authorizing the state board of agriculture to grant or refuse a license to mine for phosphate rock, "as the said board may in its discretion deem best for the interests of the state," etc., Port Royal Min. Co. vs. Hagood, 30 S. C. 519, 9 S. E. 686, 688; an ordinance which required an applicant for a license to deal in corporate securities to satisfy the commissioner that he was a person of good repute, the court saying: "Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked," Hall vs. Geiger-Jones Co., 242 U. S. 539, 61 L. Ed. 480.

In New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305, the court said:

"In Gundling vs. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation and a suitable person to be intrusted with their sale. And in the recent case of Jacobson vs. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, this court sustained a compulsory vaccination law which delegated to the board of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination. And in Fischer vs. St. Louis, 194 U. S. 361, 48 L. Ed. 1018, 24 Sup. Ct. Rep. 673, an ordinance of the city of St. Louis providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the

passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on, power to grant or withhold permits this court said:

[fol. 160] "'It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (Chicago vs. Trotter, 136 Ill. 430, 26 N. E. 359; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State vs. Fiske, 9 R. I. 94; Baltimore vs. Radecke, 49 Md. 217, 33 Am. Rep. 239; Sioux Falls vs. Kirby, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156), and in others that such authority cannot be delegated to the adjoining lot owners (St. Louis vs. Russell, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245). *But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority.* (Quincy vs. Kennard, 151 Mass. 563, 24 N. E. 860; Com. vs. Davis, 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. Rep. 389, 39 N. E. 113) *and by this court the delegation of such power, even to a single individual,* was sustained in Wilson vs. Eureka City, 173 U. S. 32, 43 L. Ed. 603, 19 Sup. Ct. Rep. 317, and Gundling vs. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633.'" (Italics ours.)

Even if there should be applied to the present case the rule that statutes or ordinances vesting discretion in administrative officers and bureaus must lay down rules and tests to guide and control them in the exercise of the discretion granted, it seems plain that the statute under consideration sufficiently declares the policy of the law and lays down rules and tests to guide and control the State Highway Commissioner in the exercise of the discretion granted to him in respect to requiring the elimination of grade crossings.

The statute delegates to such officer the administrative function of determining whether the public safety or convenience requires the elimination of a particular grade crossing and the substitution therefor of an overhead or

underpass crossing, as the case may be. The statutory limitation upon his authority to act is that he is prohibited from requiring such elimination unless, in his opinion, the public safety or convenience requires it. The General Assembly has not attempted to define the phrase "public safety or convenience", nor has it attempted to declare when, how or where, or under what circumstances the public safety or convenience would, or would not, be promoted by the elimination of a particular grade crossing. The obvious reason for the omission to define the phrase is because it would seem to be impossible to define it, so that the definition would comprehend every variety and set of [fol. 161] circumstances surrounding each particular grade crossing, for the facts and circumstances and local conditions in each case would necessarily be different. The statute, however, declares the policy of the law, viz., the elimination of crossings at grade of state roads by railroads whenever the public safety or convenience requires such elimination. The statute having established the primary standard for the elimination of grade crossings may devolve upon him, an administrative officer, the executive or administrative duty of carrying out the policy and purpose of the statute.

In Gaylord vs. City of Pasadena, 175 Cal. 433, 166 Pac. 348, there was involved the validity of an ordinance providing that whenever the city electrician should find any electrical wiring, connections, appliances, apparatus, machinery, equipment, or work, installed in buildings within the city which was dangerous to life or liberty, he should, in writing, notify the owner to cease using electrical current in or through such electrical wiring and to have the indicated defects repaired within a reasonable time, not exceeding ten days. Such notice to the owner was required to be in writing and to specify the particulars in which the electrical equipment was defective, and further to specify the necessary steps to be taken to remedy the defects. An appeal was provided from this determination of the city electrician to the city council, and if no appeal was taken, or if the city council upheld the determination of its city electrician, then within five days after the expiration of the time for appeal, or within five days after the council's ruling refusing to sustain the appeal, if the repairs were not made by the owner, the city electrician was to serve

written notice upon the firm or corporation furnishing such electrical current to cease supplying it until such defects had been corrected. It was contended that the ordinance was void as unwarrantedly conferring upon the city electrician judicial or legislative powers, and because its terms were indefinite, arbitrary and oppressive. It was held that such ordinance was not void as unwarrantedly conferring upon the city electrician judicial or legislative powers nor because its terms were indefinite, arbitrary or oppressive, and that in determining whether the city council's delegation of duties and powers as to electrical equipment was warranted, the controlling consideration was, not that the power might be unreasonably or oppressively exercised, since every presumption was that it would be honestly and [fol. 162] reasonably exercised. It was further held that an unnecessary liberality was shown in the ordinance in conferring, as it did, a right of appeal to the council, for the ordinance, if good at all, would unquestionably be good without such right of appeal, and the householder, conceiving himself to be injured, would be left to his action in court. Henshaw, J., delivering the opinion of the court, said:

"*We do not understand that respondent contends or that the court held that if the municipal council of the city of Pasadena had gone in a body and had inspected the premises, and from this inspection had determined that the indicated defects existed,* or even if sitting in a quasi judicial capacity they had taken the evidence of their city electrician and upon that had found that these defects existed, *and had thereupon directly served upon the property owner the notice which the city electrician served upon him, any violence would have been done to the law or to the respondent's constitutional rights.* The unwarranted, arbitrary, and illegal exercise of power, then, is found to *lie in the fact that the city electrician was permitted, as the authorized agent of the city council, to pass his judgment and make his determination upon the question, and further, because in passing his judgment and in making his determination he was inadequately controlled by specifications* limiting *his power, those specifications not particularizing what he must find before he could declare that the electrical appliances were dangerous to life or property, but leaving*

to the exercise of his discretion the determination whether or not in a given instance they were so dangerous to life or property. * * *

"Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the directly legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety [fol. 163] of the republic, and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares:

"'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' (Union Bridge Co. vs. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.)

"*Since, as has been said, the City council of Pasadena would have in any proper case the unquestioned right under the exercise of its police powers to compel a householder to make good the electric appliances upon his premises, the present problem narrows itself down to a determination whether or not in the method which was adopted they conferred upon a subordinate officer or agent unreasonable powers, and herein the controlling consideration is not that the power conferred may be unreasonable or oppressively exercised, for every presumption is that it will be honestly and reasonably exercised.* * * Therefore eliminating the possibility of an unjust and oppressive use of the power against which the courts will interfere (New

York vs. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220), the question is: Can it be justly said that this delegated power is either in its terms illegally oppressive or in its terms lacks definiteness, thus allowing too great a play to the discretion of the city electrician? That an official charged with such a duty as this may, and indeed must, exercise discretion precisely as he may or must exercise judgment is, of course, true, but this fact in no way militates against the validity of the law, for, as said in the Van De Carr Case, supra:

"'The authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion.'

"A brief review of a few of the many cases will illustrate the nature and extent of powers exercised by inferior tribunals and officers whose grants of power have been upheld. * * *

"It would unduly and unnecessarily prolong this con- [fol. 164] sideration to cite the like adjudications which have been handed down by the state courts, and we may come immediately to a consideration of the ordinance before us. It does not define what conditions the city electrician must find to exist before he determines that the electrical apparatus is unsafe or dangerous. From the very nature and character of such apparatus it would be impossible for any ordinance so to do without working in many instances the very oppression which its language, necessarily general, is designated to prevent. As we have said, it is presumed that the city electrician will act fairly. It is also presumed that he is competent. *An unnecessary liberality is shown in this ordinance in conferring, as it does, a right of appeal to the council, for the ordinance, if good at all, would unquestionably be good without such right of appeal, and the householder conceiving himself to be injured would be left to his action in court.* This ordinance is peculiarly like the North Carolina statute constructed by the Supreme Court of the United States in Red 'C' Oil, etc., Co. vs. Board of Ag. of N. C., 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240. The statute required only that illuminating oils 'be safe, pure, and afford a satisfactory light', and gave to the state board of agriculture the power to estab-

lish rules and regulations and to determine what oils measured up to standard. The Supreme Court of the United States declared that this was not an illegal grant of legislative or judicial power and the requirements of the statute that illuminating oils should be 'safe, pure and afford a satisfactory light, established a "sufficient primary standard"'" * * *

"It is concluded, therefore, that the ordinance here under consideration is not void as unwarrantedly conferring upon the city electrician judicial or legislative powers, nor yet void because its terms are either indefinite, arbitrary, or oppressive." (Italics ours.)

In Carter vs. Stevens, 211 Cal. 281, 295 Pac. 28, 32, there was involved a statute regarding the licensing of "clothes cleaning establishments" and requiring an application for the license to be made to the Department of Industrial Relations, and providing that the department, or its duly authorized representative, should make a thorough investigation into the fitness of the applicant to conduct such establishment, and that if such investigation revealed that the clothes cleaning establishment or its plans, specifications, or premises, or the character or ability of the applicant to conduct the establishment were not in compliance with the [fol. 165] provisions of law or in any manner jeopardized the public welfare, or, in the opinion of the department or its authorized representative, made such proposed establishment a menace to the public welfare and safety, the department was empowered to deny such applicant a permit or license to establish or maintain a "clothes cleaning establishment". The court following Gaylord vs. City of Pasadena, supra, held that the legislature had very properly placed the operation of "clothes cleaning establishments", in which the use of volatile and inflammable substances and heat, steam, and hot water played the principal part, in the list of hazardous businesses, and that the whole subject-matter came within the power of police regulation of the state; that the provision in question did not confer unlimited or arbitrary power on the state officials; that the statute was not unconstitutional as failing to set up a definite standard or test by which the delegated power was to be exercised or as conferring arbitrary power or judicial or legislative powers on the enforcement agency; that the De-

partment of Industrial Relations might not arbitrarily deny a license or permit for clothes cleaning establishments, and that if it did so, the courts might correct the wrong; that it was not to be presumed that the department would deny a license or permit for a clothes cleaning establishment without good cause and that the statute did not violate the due process clauses of the State or Federal constitutions.

See, also, Butterfield vs. Stranahan, 192 U. S. 470, 48 L. Ed. 525.

Applying to the present case the doctrine that the State has the power to regulate or restrict the right of the owner of property to enjoy the full use of it where such use would be injurious to the public safety, welfare and/or convenience, and to delegate to an administrative officer of the State the discretion to ascertain and determine whether or not such use is inimical to the public safety, welfare and/or convenience, and the power to deny the owner of such property the right to use and enjoy his property in a manner which is inimical to the public safety, welfare and/or convenience—which doctrine is, in my opinion, sound—I am of the opinion that the statute in question does not conflict with any constitutional provision—State or Federal.

Before concluding this opinion, it is to be noted that if the State Highway Commissioner should act arbitrarily [fol. 166] and oppressively in requiring the elimination of a particular grade crossing, the railroad company would have the right to proceed in the courts to prevent such arbitrary and oppressive action.

New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305;

Jacobson vs. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;

Zucht vs. King, 260 U. S. 174, 67 L. Ed. 194, 198;

Lehigh Valley R. Co. vs. Board of Public Utility Com'rs, 278 U. S. 24, 73 L. Ed. 161;

State Racing Commission vs. Latonia Agricultural Ass'n, 136 Ky. 173, 128 S. W. 681;

Carter vs. Stevens, 211 Cal. 281, 295 Pac. 28, 32;

Gaylord vs. City of Pasadena, 175 Cal. 433, 166 Pac. 348.

In New York vs. Van De Carr, 199 U. S. 552, 50 L. Ed. 305, it was said:

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, *and when it is shown to be thus exercised against the individual, under sanction of State authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court.* Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064." (Italics ours.)

In Jacobson vs. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, Mr. Justice Harlan, delivering the opinion of the court, said:

"Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—*that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority,* may be exerted in such circumstances, or by regulations *so arbitrary and oppressive in particular cases,* as to justify the interference of the courts to prevent wrong and oppression." (Italics ours.)

[fol. 167] In State Racing Commission vs. Latonia Agricultural Ass'n, 136 Ky. 173, 196, 128 S. W. 681, the court said:

"The courts may always, upon complaint of any one having an interest and feeling aggrieved, examine into the exercise of power by a ministerial officer to the extent of determining whether the particular power has been granted to the official, whether it is a legal power that could have been granted to him, *or whether it has been exercised in a legal manner.* This jurisdiction does not depend upon an act of the Legislature authorizing it, *but inheres in the courts of general jurisdiction as an essential function of*

the judicial department of our government.". (Italics ours.)

In Lehigh Valley R. Co. vs. Board of Public Utility Comrs., 278 U. S. 24, 73 L. Ed. 161, 169, it was urged that a statute authorizing a commission to eliminate grade highway crossings was unconstitutional, "because it made no provision for appeal from the decision of the commission to a court with jurisdiction judicially to determine independently on the law and facts whether the property of the railroad company was being confiscated in violation of the Fourteenth Amendment". The provision for a court review of an order of the commission was by certiorari, and objection was made to this remedy before the Supreme Court on the ground that it was within the discretion of the court. It was held that if for any reason certiorari should not be available or adequate, the railroad company might resort to a court of equity for relief. Mr. Chief Justice Taft said:

"But if for any reason that remedy (*certiorari*), as defined in those decisions, should not be available or be inadequate, it would seem to be clear that *resort then might be had to the court of chancery.* In Allen vs. Distilling Co. of America, 87 N. J. Eq. 531, 100 Atl. 620, the court of chancery in New Jersey used this language:

" 'So long as courts of equity are to serve the purpose of the creation of the court of chancery of England—and in this state the court of chancery is the successor, in all that such term implies, of that court—jurisdiction must depend only upon the existence of, or a threatened wrong, and the absence of an adequate remedy at law. . . . Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties im- [fol. 168] posed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the court of chancery.' " (Matter in parenthesis and italics ours.)

Courts of equity in Virginia possess the power to review an unreasonable or oppressive exercise of the power con-

ferred by the statute here involved upon the State Highway Commissioner if he should act arbitrarily or oppressively and the same jurisdiction resides in the Federal courts.

In Wadley Southern Railway Co. vs. Georgia, 235 U. S. 651, 59 L. Ed. 405, 411, in referring to the right of judicial review of an order of the State Railroad Commission of Georgia, directing a railway company to discontinue the practice of demanding prepayment of freight from one connecting carrier while not exacting it from another, and to the right of judicial review of the findings of the Commission, Mr. Justice Lamar said:

"The methods by which this right to a judicial review are secured vary in different jurisdictions. In some states there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the commission. * * * *In others, by proceedings in equity. In the Federal Courts the method of procedure,* when administrative orders are attacked as unconstitutional, is now regulated by Sec. 266 of the Judicial Code (36 Stat. at L. 1162, chap. 231), as amended (37 Stat. at L. 1014, chap. 160, Comp. Stat. 1913, Sec. 1243)." (Italics ours.)

The defendant in its brief seems to attack the validity of the statute in question on the ground that it confers upon no tribunal the power to review the ruling of the State Highway Commissioner. Even though there were a provision in the statute giving such right of review, such provision would not relieve the act from the objection, if there were any, that it conferred arbitrary powers on the State Highway Commissioner, for any tribunal reviewing the action of the State Highway Commissioner would act as an administrative and not a judicial body, and if the statute here involved be void because it is a delegation of legislative power to an administrative officer and vests in him an arbitrary and uncontrolled discretion, a provision authorizing the exercise of the same discretion by the reviewing tribunal would also be void, as its discretionary power would be the same as that of the State Highway Commissioner, except that its exercise of its discretion might su-

[fol. 169] persede that of the State Highway Commissioner.

The fact that the statute does not confer a right of review does not render it obnoxious to the due process of law clause, for the right of appeal is not essential to due process of law.

Luckenbach S. S. Co., Inc., vs. United States, 272 U. S. 533, 536, 71 L. Ed. 394, 395;
Reetz vs. Michigan, 188 U. S. 505, 47 L. Ed. 563;
Carter vs. Stevens, 211 Cal. 281, 295 Pac. 28;
Gaylord vs. Pasadena, 175 Cal. 433, 166 Pac. 348;
Block vs. City of Chicago, 239 Ill. 251, 87 N. E. 1011.

In Thompson vs. Smith, 155 Va. 367, 154 S. E. 579, there was involved a city ordinance which authorized the chief of police to revoke the permit of any driver who, in his opinion, becomes unfit to drive, but which further provided that the holder might apply to the judge of the municipal court to have his permit reinstated. It was held that when acting upon an application for the reinstatement of a permit revoked by the chief of police, the judge of the municipal court is acting as an administrative officer and not in a judicial capacity and his discretionary power is the same as that of the chief of police, except that the exercise of his discretion may supersede that of the chief of police, and that if such provision of the ordinance was void because a delegation of a legislative power to an administrative officer and vesting the chief of police with an arbitrary discretion, the provision authorizing the exercise of the same discretion by the judge of the municipal court upon application for reinstatement of the permit was also void.

See, also, State Racing Commission vs. Latonia Agricultural Ass'n, 136 Ky. 173, 175, 123 S. W. 681.

Summarizing my conclusions, I am of the opinion that the statute under consideration is an exercise of the police power of the State, and is not in contravention of section 11 of article I of the Constitution of Virginia, nor of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because it does not provide that prior to the making by the State Highway Commissioner of his requirement that a grade crossing be eliminated the railroad company shall be given an opportunity to be heard; that the function delegated by the statute in question to such officer is not the delegation of a legisla-

tive, but of an administrative function, and that such delegation is not prohibited by or in contravention of any pro-
[fols. 170 & 171] vision of the Constitution of the United States or of the State of Virginia, and that the manner in which the General Assembly has exercised the delegation of such function to the State Highway Commissioner is open to no constitutional objection.

An order will accordingly be entered overruling the demurrer of the defendant.

DEPARTMENT OF THE STATE OF CORPORATION COMMISSION

CHAIRMAN'S CERTIFICATE

The Chairman of the State Corporation Commission hereby certifies to the Supreme Court of Appeals of Virginia that the foregoing contains and sets out all the facts and evidence upon which the action of the Commission in said proceeding was based and which was essential to a proper decision of the appeal to be taken from such action, and is also a true transcript of the proceeding and orders of the Commission of such proceeding.

Witness the seal of the State Corporation Commission and the signature of its Chairman, attested by the Clerk, this 27th day of May, 1932, and in the 157th year of the Commonwealth.

Geo. C. Perry, Chairman. (Seal.)

Attest:

N. W. Atkinson, Clerk of the Commission.

DEPARTMENT OF THE STATE CORPORATION COMMISSION

CLERK'S CERTIFICATE

I, N. W. Atkinson, Clerk State Corporation Commission, do hereby certify that proper notice was given of the intention to apply for a transcript of the record in this case as the basis for appeal in the Supreme Court of Appeals of Virginia, pursuant to the provisions of Section 6339, Code of Virginia, 1919.

N. W. Atkinson, Clerk of the Commission.

A copy. Teste:

H. Stewart Jones, C. C.

[fols. 172 & 173] Minute entries of argument and submission, November 17 and 18, 1932, omitted in printing.

[fol. 174] IN SUPREME COURT OF APPEALS OF VIRGINIA

All the justices present.

SOUTHERN RAILWAY COMPANY

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HENRY W. HOLT—Richmond, Va., January 12, 1933

This is a proceeding in which the Commonwealth of Virginia is endeavoring to force the Southern Railway Company to build an overhead crossing in Mecklenburg county at a point where State Highway No. 12 now crosses the railway right of way at grade.

On January 7, 1931, the State Highway Commissioner, acting under statutory authority, notified the railway company that in his opinion public safety and convenience required the elimination of this grade crossing. The notice set out that plans for necessary work had been submitted to him by the railway company and by him approved. To that notice the railway company replied on January 20, 1931, and said that the act relied upon was unconstitutional and void. It declined to comply with the commissioner's request. After the receipt of this refusal he filed a complaint with the State Corporation Commission, in which he invoked its power to compel the performance by the railway company of the duty imposed upon it by the notice. That complaint was duly docketed and an order was entered requiring the defendant to appear and answer on March [fol. 175] 30, 1931.

The defendant did appear and demurred. The demurrer challenged the authority of the State Highway Commissioner and of the State Corporation Commission, on the ground that the statute relied upon was unconstitutional under the due process clause of Article 1, section 11, of the Constitution of Virginia, and under the due process

clause of the 14th Amendment to the Constitution of the United States.

This demurrer was duly considered by the Commission, which in an able opinion prepared by Honorable William Meade Fletcher, one of its members, reached the conclusion that the challenged statute was a proper exercise of power by the State, and on March 8, 1932, directed the railway company to proceed with the construction of this overhead crossing in accordance with plans approved. It is from that order that this appeal has been taken.

Road-building in Virginia, as at present prosecuted, is a comparatively new undertaking. In section 39 of chapter 4, Acts 1902-3-4, the latter part of which was the same as section 3974, Michie's Code, 1930, we find in substance these provisions: The board of supervisors in any county in which there is a grade crossing, may, when in its opinion [fol. 176] elimination is necessary for the improvement of the county road, petition in writing the railway company to make the necessary change. Should that company be unwilling to comply, the board may then, by another petition, apply to the State Corporation Commission for relief. The case made is to be heard as other petitions are heard; all done, of course, on notice.

At the same time, section 38 of chapter 4, Acts 1902-3-4, which was the same as section 3972, Michie's Code, 1930, declared in terms that the policy of the State was to eliminate all grade crossings wherever reasonably practicable.

This court, in Southern Railway Co. v. Commonwealth, 124 Va. 36, said that the State Corporation Commission was vested with ample power in the premises, but that it should be exercised with caution, and that such changes should not be ordered except for cogent reasons.

At that time our State Highway system, as now constituted, had not been devised. In 1918 a "State Highway system" was created. Acts 1918, p. 9. Under increased traffic which has followed its construction, grade crossings have become increasingly dangerous.

The idea that notice, if not necessary, was at least proper continued. Acts 1920, p. 411, authorizes the road to make changes at crossings on their own initiative and according [fol. 177] to their own plan, but boards of supervisors and the State Highway Commissioner are given the right to appeal to the State Corporation Commission to prevent

the carrying out of such contemplated changes. That appeal was upon notice.

In 1924 (Acts 1924, p. 146), the power challenged was for the first time conferred. With changes not here material it reappears in the Acts of 1930, p. 74; Michie's Code, 1930, sec. 3974-a. As amended it now reads:

"* * * whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead or underpass crossing becomes, in the opinion of the State Highway Commissioner, necessary for the public safety or convenience, or whenever, in the opinion of the State Highway Commissioner, the public safety and convenience requires that an overhead or underpass crossing of a railroad and a State highway shall be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, the State Highway Commissioner shall notify in writing the railroad company whose track is to be crossed or upon which the existing crossing at grade, or the overhead or underpass crossing is, as the case may be, stating particularly the [fol. 178] point at which the crossing is desired or the existing grade crossing is to be eliminated, or the overhead or underpass is to be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, as the case may be, and that the public safety or convenience requires that the crossing be made either above or beneath the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above or beneath the tracks of said railroad, or that the overhead or underpass crossing be widened, strengthened, remodeled, redesigned, relocated or replaced, or a new or improved structure provided in lieu thereof, as the case may be, and shall submit to said railroad company plans," etc.

Under it the commissioner was to submit to the railroad company plans for the proposed work. If they were not satisfactory, the road might, in lieu thereof, submit its own plans. Should an agreement not be reached, the controversy is referred to the State Corporation Commission, whose duty it is to either approve one of the plans sub-

mitted, or to substitute its own, one-half of the cost of this work to be paid by the road and one-half by the State.

The Highway Commission is an administrative depart-[fol. 179] ment of the State, charged with powers and duties defined by statute, among which is police power (Code 1930, secs. 1969-1969-p), a power authorized and confirmed by our Constitution.

"* * * the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State." Va. Const., sec. 159.

The Fourteenth Amendment of the Federal Constitution does not take from the State these powers to police which were reserved at the time the Constitution was adopted.

"But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, some-[fol. 180] times termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' " Mugler v. Kansas, 123 U. S. 623.

Of course, it is subject to constitutional limitations.

"Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the power confided to the general government." Mugler v. Kansas, supra.

"It cannot be supposed that the States intended, by adopting that Amendment (the Fourteenth Amendment) to impose restraints upon the exercise of their powers for the protection of the safety, health or morals of the community." Idem.

No inclusive workable definition of "police power" has been or can be formulated. New conditions constantly arise and must be met as they come (Hudson County Water Co. v. McCarter, 209 U. S. 349), subject always to constitutional limitation.

Impossible burdens may be imposed. Dangerous cross-[fol. 181] ings may be abolished at the entire expense of a railroad, even though it may be bankrupted in the prosecution of the work. Erie R. R. Co. — Public Util. Comm'rs, 254 U. S. 394.

When we come to deal with statutes every possible presumption is to be indulged in favor of their validity. Sinking Fund Cases, 99 U. S. 700; Farmers &c. Insurance Association v. Horton, 157 Va. 114.

It is well to bear in mind just what we have to decide. The issue here is narrow. These statements of it are made on behalf of the railway company:

"It will be noted that the demurrer raised no question of the substantive power of the State. Admittedly the State has the substantive police power to make reasonable requirements enforcing uncompensated obedience by railroads to promote public safety and convenience, as by contributing their own property to the construction of grade crossing elimination structures reasonably necessary to protect the public. Admittedly the States have the substantive power, subject to the restrictions of the Constitutions and of Federal Law, as Mr. Justice Holmes said in Erie Railway Co. v. Public Utility Commissioners, 254 U. S. 394, 65 L. Ed. 322, to 'be so foolish as to kill the goose that lays golden eggs for them.' But they must fol-[fol. 182] low primary, procedural due process of law in doing so. The goose may not be killed without notice and hearing, without right to contest and plead for its life. It may not be killed by ex parte fiat or ukase of an administrative official, made in his own arbitrary discretion, final and irrevocable in its nature and subject to no appeal or judicial review on the merits.

* * * * * * *

"As heretofore stated, appellant in no wise questions the substantive power of the State to make reasonable regulations under its police power, requiring railroads to eliminate grade crossings at their own expense, in whole or in part, provided such regulations are made in compliance with constitutional requirements as to primary or procedural due process of law. The law in this regard is too well settled to be the subject of question.

* * * * * * *

"It is true that the legislature may make a legislative determination, whether under the police power, the tax power, or any other power, without notice and hearing to the persons affected."

From this we see that the power of the State, acting through its legislature, to order this change in grade is not questioned. Power is conceded but procedure is protested.

[fol. 183] It is contended that the legislature has not acted at all but has undertaken to delegate its legislative powers to another. Of course the power to legislate cannot be delegated. The legislature is the source from which legislation must come. But if the act in judgment sufficiently indicates legislative purpose, and has merely left administrative details to some agent, this assignment is without merit. If it has undertaken to delegate to this agent legislative power, then this objection is well taken. Stuart's Ex'ors v. Sinking Fund Comm'rs, 123 Va. 224; Eubank v. Richmond, 226 U. S. 137. In the Eubank case the right to act was given a group of private citizens; here it is vested in an administrative agent who has statutory supervision of all the highways of the Commonwealth. The legislature does not sit continuously, and must, of necessity, work with and through some such instrumentality.

In Chicago &c. Railroad v. Nebraska, 170 U. S. 77, that court, quoting with approval from Health Department v. Trinity Church, 145 N. Y. 32, said: "The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case.

"* * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of [fol. 184] health, * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. * * * Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

The closing observation of Judge Peckham bears with force upon the situation here. One crossing accident might cost the road more than the entire expenditure made necessary by this change in grade.

In Union Bridge Co. v. United States, 204 U. S. 364, Mr. Justice Harlan, quoting from Moers v. City of Reading, 21 Pa. St. 188, 202, said:

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the [fol. 185] proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law."

He then cites with approval this statement from Locke's Appeal, 72 Pa. St. 491, 498:

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government."

The same general principle appears in Breiholz v. Pocahontas County, 257 U. S. 118:

"The only possible source of objection remaining is the committing to the board of supervisors the power to deter-

mine, without notice and hearing, when repairs are necessary (to a drainage system) and the extent of them. But these are details of State administration with which the Federal authority will not interfere, except possible to prevent confiscation * * *."

In Bragg v. Weaver, 251 U. S. 57, 58, 40 Sup. Ct. 62, 63, the court said:

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amend-
[fol. 186] ment."

We might buttress this principle by a host of citations form State courts but it is not necessary. Our court is of the same opinion.

In Stuart's Ex'ors. v. Sinking Fund Commissioners, supra, the statement in Locke's Appeal, supra, was expressly approved, and it was held that the legislature might delegate to an administrative board power to determine facts and things upon which action under its Statute was to depend. To the same effect see Taylor v. Smith, 140 Va. 217, where Judge Burks, after citing many cases, said:

"We are of opinion that a city may, in the execution of its police power, invest its administrative and executive officers with a reasonable discretion in the performance of duties devolved upon them to that end, whenever it is necessary for the safety and welfare of the public. Such a discretion is neither arbitrary nor capricious."

In Thompson v. Smith, 155 Va. 367, Mr. Justice Epes, in discussing an ordinance of the city of Lynchburg, has reached the same conclusion:

"This does not mean, however, that no discretion can be left to administrative officers in administering the law. Government could not be efficiently carried on if something could not be left to the judgment and discretion of adminis-
[fol. 187] trative officers to accomplish in detail what is authorized or required by law in general terms. Without this

power legislation would become either oppressive or inefficient. There would be confusion in the laws, and in an effort to detail and particularize, the law would miss sufficiency both in provision and detail. Block v. Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219; Mutual Film Corp. v. Ohio Indus. Comm., 236 U. S. 239, 35 Sup. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916-C, 296. This is particularly true where the discretion to be exercised by administrative officers relates to police regulations designed to protect the public morals, health, safety and general welfare."

There an ordinance, dealing with the drivers of motor vehicles, said in part:

"The chief of police is authorized and directed to revoke the permit of any driver who, in his opinion, becomes unfit to drive an automobile on the streets of the city * * *."

It was held that legislation must declare the policy of the law and fix the legal principles which are to govern its administration. When it was said that the chief of police might revoke the permit of any driver who in his opinion became unfit to drive, no principle to control his action is suggested by the ordinance. In this it differs from the statute in judgment. Here the highway commissioner must [fol. 188] believe that public safety or convenience necessitates the change, and this belief must rest upon the facts. Plainly the statute could not undertake to say what made a crossing unsafe; that is a fact to be ascertained by its agent, and, when ascertained, it becomes the commissioner's duty to do what the statute told him to do. Grade crossings are to be eliminated "wherever reasonably practicable," and particularly where they are unsafe. The duty of ascertaining facts calling for action is placed with the supervisor of roads. This statutory policy and supervision is confirmed by its own Constitution, which, in section 164, declares that

"The right of the Commonwealth, through such instrumentalities as it may select, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor shall never be surrendered or abridged."

Names are unimportant and it matters little whether these governmental agencies be called executive or administrative. However designated, it is entirely proper to delegate to them the power to ascertain the existence of some state of facts upon which the operation of the law by its terms depends. People v. Joyce, 246 Ill. 124, 92 N. E. 607. Here the necessities for it are admitted by the demurrer.

[fol. 189] Was notice to the railway company necessary before the commissioner undertook to ascertain the character of the crossing? It was not unless property in some proper sense was to be taken.

In New Orleans Public Service v. City of New Orleans, 281 U. S. 682, 50 Sup. Ct. 449, the court said:

"The value of the viaduct to be removed, the large expenditure involved for construction of the crossing in its place, and the dangers incident to their use constitute the sole basis of fact on which the ordinance is assailed. It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law."

Undoubtedly property may be destroyed. Malaga grapes have value, but since they may harbor pests harmful to our vineyards their importation is prohibited, and if brought in may be destroyed without notice and without redress to their owner. Money must be spent in cleaning ice and snow from sidewalks, yet an ordinance that directs that it be done by lot owners is valid. Goddard, Petitioner &c., 16 Pick. 504, 28 Am. Dec. 259. No one can contend that this lot owner must be served with notice.

[fol. 190] While it cost more to make a crossing safe than it does a sidewalk, there is no difference in principle, unless it be that the State has more control over a railway than it has over a householder.

A statute in West Virginia authorized the State entomologist to ascertain, in certain circumstances, if cedar trees were infested with apple rust. If found to be so infested, he might require the owner to destroy them. Upon the owner's failure to act, he might. The court, in sustaining the statute, said that a State might authorize a summary

abatement of the nuisance. Lemon v. Rumsey, 108 W. Va. 242, 150 S. E. 725.

In Commonwealth v. Roberts, 155 Mass. 281, 16 L. R. A. 400, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that the act was a valid exercise of the police power, and applicable to buildings erected before its enactment as well as to those subsequently constructed. Health Department v. Trinity Church, 145 N. Y. 2, 39 N. E. 833; Chicago, &c., Ry. v. Nebraska, supra.

A house infested by plague-stricken rats may be destroyed. In short, the State, in the exercise of its police power, acting within reason, may take summary action to [fol. 191] protect the health or safety of its citizens although such action may necessitate the expenditure of money or the destruction of property.

It is conceivable that under change in traffic conditions, a crossing, once safe, may become a death trap. On the other hand, notwithstanding the fact that the State is proceeding under police power, property cannot be taken nor expenditures ordered merely to meet demands of convenience, as is illustrated by the case of Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, where for economic reasons, the construction of a spur track was ordered.

In the protection of the people large discretion must be given to the legislature.

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, &c. Ry. Co. v. May, 194 U. S. 267.

The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand. Jacobson v. Massachusetts, 197 U. S. 11; New York v. Van De Carr, 199 U. S. 552; Wadley Southern Ry. Co. v. Georgia, 235 U. S. [fol. 192] 651.

This case has been ably argued. The opinion of Commissioner Fletcher is comprehensive and convincing.

Space and time prevent nor is it necessary to examine all the cases to which our attention has been invited, for the issue, as we have seen, is narrow.

To summarize our conclusions, we are of opinion that the State may delegate to an administrative officer or board power to determine facts and things upon which action under its statute depends. This is not a delegation of power to legislate, and where the safety of its citizens is at stake, it may, without notice, take such action as is reasonably necessary for their protection. If action is arbitrary, control is vested in the courts.

The order appealed from should be affirmed, and it is so ordered.

Affirmed.

Campbell, C. J., and Epes, J., dissenting.

[fol. 193] IN SUPREME COURT OF APPEALS OF VIRGINIA

SOUTHERN RAILWAY COMPANY, Appellant,
against
COMMONWEALTH OF VIRGINIA at the Relation of H. G. SHIRLEY, State Highway Commissioner, Appellee

Upon an Appeal from and Supersedeas to an Order Entered by the State Corporation Commission on the 8th Day of March, 1932

JUDGMENT—Jan. 12, 1933

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the same be affirmed, and that the appellant pay to the appellee thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said State Corporation Commission.

A Copy. Teste:

H. Stewart Jones, C. C.

[fol. 194] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal to United States Supreme Court, Assignment of Errors, Prayer for Reversal, and Supersedeas

PETITION FOR APPEAL

Southern Railway Company, the appellant herein, considering itself aggrieved by the final judgment of the Supreme Court of Appeals of the State of Virginia rendered on the 12th day of January, 1933, in the above entitled cause, presents this petition within three months thereafter, and respectfully shows:

I

Said final judgment was in a suit in the highest court of said State of Virginia in which a decision could be had, in which there was drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; the said statute, the validity of which was drawn in question, being the Act of the General Assembly of Virginia approved February 27, 1930, [fol. 195] Chapter 62, Acts 1930, the grounds of its asserted invalidity being that it is repugnant to the due process clause of the 14th Amendment to the Constitution of the United States; and it being further asserted by appellant in said suit that the determination and requirement made against appellant by the State Highway Commissioner of the State of Virginia, and the order of the State Corporation Commission ordering appellant to carry out and perform the said requirement of the State Highway Commissioner, both made under sole authority of said unconstitutional statute, were likewise null and void and repugnant to the due process clause of the 14th Amendment to the Constitution of the United States; the decision of the Supreme Court of Appeals of Virginia being in favor of the validity of said statute and of the determination and requirement of the State Highway Commissioner and of the order of the State Corporation Commission based thereon.

Jurisdiction of the Supreme Court of the United States on appeal is, therefore, invoked by said appellant under Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 936), 28 U. S. C. 344a (as in effect at and prior to the passage of the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said two Acts of the year 1928.

ASSIGNMENT OF ERRORS

And the said Southern Railway Company assigns the following errors in the record and proceedings in the said case:

Assignment No. 1

The Supreme Court of Appeals of Virginia erred in holding that Chapter 62, Acts of Virginia 1930, approved February 27, 1930, and the proceedings pursuant thereto whereunder the State Highway Commissioner of Virginia determined that in his opinion the elimination of an existing grade crossing of appellant's railroad and right of way and a state highway at Antlers, Virginia, was necessary for public safety and convenience and required appellant to [fol. 196] provide all equipment and materials and construct, at its own expense in part, an overhead bridge to carry the state highway across and above appellant's right of way and track, are, as applied to appellant, valid and constitutional, and in affirming the decision by the State Corporation Commission of Virginia holding that said statute and said determination and requirement made by the State Highway Commissioner are valid and constitutional and impose an enforcible and constitutional legal obligation on appellant to obey said requirement and ordering appellant to obey and perform said requirement; the error being that the said statute is, and the said determination, requirement and enforcing order based thereon are, unconstitutional, null and void, taking appellant's property without due process of law, in violation of appellant's rights under the 14th Amendment to the Constitution of the United States, in that said statute by its terms undertakes to delegate to the State Highway Commissioner, an administra-

tive official, the power to make, and that he did, pursuant solely to the supposed authority of said statute, make said determination and said requirement, without previous notice to appellant and without hearing afforded appellant as required by due process of law, without taking or considering evidence, based solely upon his personal ex parte opinion, and as the expression of a purely arbitrary administrative fiat, and in that the said statute makes no provision for judicial review on the merits of his said determination as to public safety and convenience and makes the said determination final and irrevocable, and undertakes to create and impose upon appellant, upon the sole basis of said determination, an enforcible and final legal duty to perform the requirement of the State Highway Commissioner, thus depriving appellant of primary or procedural due process of law and taking its property without primary due process of law.

PRAYER FOR REVERSAL AND FOR SUPERSEDEAS

For which errors above set out, the appellant, Southern Railway Company, prays that the said judgment of the Supreme Court of Appeals of the State of Virginia, dated the 12th day of January, 1933, in the above entitled cause, be reversed and a judgment rendered in favor of appellant, and for costs.

And appellant further prays that it may have a supersedeas to the said final judgment of the Supreme Court of Appeals of Virginia and that execution thereof and other [fols. 197 & 197½] proceedings under said judgment be stayed pending the said appeal.

And appellant further prays that the Clerk of the Supreme Court of Appeals of the State of Virginia be directed to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law.

Appellant herewith tenders cost bond and supersedeas bond in such sums as the Court may require.

This the 15 day of March, 1933.

Southern Railway Company, Appellant, by Thomas B. Gay, Sidney S. Alderman, Counsel for Appellant. S. R. Prince, of Counsel.

[fol. 198] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant, the only defendant below in the cause and the only appellant in this Court, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Appeals of the State of Virginia on the 12th day of January, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Appeals of the State of Virginia in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Appeals of the State of Virginia shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same, together with all papers filed in accordance with the revised Rules of the Supreme Court of the United States, to the Supreme Court of the United States, so that he shall have the same in said Court within not exceeding forty days from this date and from the date of signing the citation.

[fols. 199 & 199½] And it is further ordered that, bond having been given, as hereinafter stated, supersedeas be, and the same hereby is, granted to the judgment of the Supreme Court of Appeals of the State of Virginia dated the 12th day of January, 1933; that the appellees, their agents and their attorneys be, and they hereby are, restrained from enforcing the requirement of the State Highway Commissioner and the order of the State Corporation Commission ordering performance of said requirement involved in this suit; and that execution and other proceedings under said judgment be, and the same hereby are, stayed, pending the said appeal.

Appellant having tendered and filed a supersedeas and cost bond with good and sufficient security, conditioned as

required by law in such cases made and provided, and in the sum of $1,000.00, said bond is accordingly approved.

Dated the 15th day of March, 1933.

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia.

[fol. 200] Citation, in usual form, showing service on J. F. Hall, omitted in printing.

[fols. 201 & 202] Supersedeas bond on appeal for $1,000 approved, omitted in printing.

[fol. 203] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of Appeals of the State of Virginia:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. The petition of Southern Railway Company, appellant, to the Supreme Court of Appeals of Virginia, from the order and decree of the State Corporation Commission of the 8th day of March, 1932, including Statement of the Case, Assignments of Error, supporting Argument, and Appendix A.

2. The Complaint of Commonwealth of Virginia at the relation of H. G. Shirley, State Highway Commissioner, Complainant, v. Southern Railway Company, Defendant, before the State Corporation Commission of Virginia, with verifications and Exhibits "A" and "B".

3. The Demurrer of Southern Railway Company, defendant, before the State Corporation Commission.

[fol. 204] 4. The order of the State Corporation Commission dated February 18, 1931.

5. The order of the State Corporation Commission dated March 8, 1932.

6. The opinion of the State Corporation Commission, by Fletcher, Commissioner, dated March 8, 1932.

7. The opinion and judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed January 12, 1933.

8. The petition for appeal, assignment of errors, and prayer for reversal.

9. The order of the Chief Justice of the Supreme Court of Appeals of Virginia, allowing the appeal, granting supersedeas and stay, and fixing and approving bond.

10. The Citation.

11. The Supersedeas and cost bond.

12. All papers filed by the parties under the requirement and authority of Rule 12, of the Rules of the Supreme Court of the United States.

13. This præcipe with proof of service.

14. The Stipulation as to transcript of record.

15. Your certificate certifying the correctness of the transcript.

Said transcript to be prepared as required by law and the rules of this court and of the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States, [fols. 205-207] at Washington, on or before the 24th day of April, 1933.

Dated the 15th day of March, 1933.

Thomas B. Gay, Sidney S. Alderman, Attorneys for the Appellant.

Service of the above præcipe accepted and acknowledged this the 15th day of March, 1933.

J. F. Hall, Attorney for the Appellee.

[fols. 208-239] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record

It is hereby stipulated between counsel for appellant and appellee that the Clerk of the Supreme Court of Appeals

of Virginia shall include in the transcript of the record to be filed in the Supreme Court of the United States all those parts of the record and only those parts designated in the præcipe of the appellant filed and served herein.

This the 15th day of March, 1933.

Thomas B. Gay, Sidney S. Alderman, Counsel for Appellant. J. F. Hall, Counsel for Appellee.

[fol. 240] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fol. 241] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS RELIED ON AND OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF, AS REQUIRED BY RULE 13, PAR. 9—Filed April 15, 1933

Now comes the appellant and adopts its Assignment No. 1 as set out in its Assignment of Errors as its statement of the points on which it intends to rely, and it respectfully represents that the whole of the record, as filed, is necessary for the consideration thereof, with the exception of the brief of the argument of appellant contained in the body of its petition on appeal from the State Corporation Commission to the Supreme Court of Appeals of Virginia, beginning on page 11 and ending on page 56 of the printed record in the court below, and appellant respectfully requests that the brief of argument be not printed but that in lieu thereof there be inserted in the printing the following statement:

"Here followed, in accordance with the State practice on appeal from the Corporation Commission to the Supreme Court of Appeals of Virginia, in the body of the petition for appeal, a brief and argument supporting the petition occupying 45 printed pages in the printed record below—omitted in printing."

Southern Railway Company, Appellant, by Thomas B. Gay, Sidney S. Alderman, Counsel for Appellant.

[fols. 242 & 243] Service of the foregoing statement of the points to be relied on by appellant and of the parts of the record it thinks necessary for the consideration thereof, pursuant to Rule 13, paragraph 9, is hereby accepted and the receipt of a copy thereof is hereby acknowledged for and on behalf of the Commonwealth of Virginia, at the Relation of H. G. Shirley, Appellee, this the 15th day of March, 1933.

J. F. Hall, Counsel of Record for Appellee.

[fol. 244] [File endorsement omitted.]

Endorsed on cover: File No. 37,569. Virginia Supreme Court of Appeals. Term No. 872. Southern Railway Company, appellant, vs. Commonwealth of Virginia at the relation of H. G. Shirley, State Highway Commissioner of Virginia. Filed April 15, 1933. File No. 37,569.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 872

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANT.

Southern Railway Company, appellant, applicant for appeal herein to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed on the 12th day of January, 1933, in accordance with the re-

quirements of Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, herewith presents this separate typewritten statement as to jurisdiction of the Supreme Court of the United States.

I.

Basis Upon Which it is Contended That the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Appeals of the State of Virginia dated and filed on the 12th day of January, 1933, herein, is a final judgment in a suit in the highest court of the State of Virginia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Virginia, and of proceedings had pursuant solely to the supposed authority of that statute, on the ground of its (the statute's) being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 28 U. S. C. 344*a*, as in effect prior to and at the enactment of the Act of January 31, 1928,

Chapter 14, 45 Stat. 54, 28 U. S. C. 861*a*, 861*b*, and of the amendatory Act of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. 861*b*, and as amended by and pursuant to the provisions of the said two last mentioned Acts of the year 1928.

III.

The Statute of the State of Virginia the Validity of Which is Involved.

The statute of the State of Virginia, the validity of which is involved, is Chapter 62 of the Acts of the General Assembly of the State of Virginia, Session 1930, approved February 27, 1930, official volume Acts of Assembly, Virginia, 1930, beginning at page 73 and ending on page 75, entitled:

> "An act to amend and re-enact an Act entitled 'An Act to amend and re-enact an Act entitled an Act to provide for the construction of overhead and underpass crossings of railroads by State highways, and for the elimination of existing grade crossings on State highways, and to provide for the payment of the costs thereof, approved March 7, 1924, approved March 19, 1926' " (S. B. 115).

In its provisions pertinent to the question here raised, the said statute provides:

> "* * * Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead * * * crossing becomes, *in the opinion of the State Highway Commissioner,* necessary for public

safety and convenience, * * * *the State Highway Commissioner shall notify in writing* the railroad company * * * upon which the existing crossing at grade * * * is, * * * *Stating particularly the point at which* * * * *the existing grade crossing is to be eliminated* * * * *and that the public safety or convenience requires* that the crossing be made * * * * above * * * the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above * * * the tracks of said railroad, * * *, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein provided for leaves the ground line of the State road to go over * * * the tracks of the railroad, and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead* * * * *crossing,* * * * in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on." (Italics added.)

There follow, in the statute, other pertinent provisions: (1) authorizing the railroad, if dissatisfied with the plans and specifications submitted by the State Highway Commissioner, to petition the State Corporation Commission, setting out its objections thereto and

recommending plans and specifications in lieu thereof, and authorizing the Commission to hear the complaint, solely as to the plans and specifications, and to approve those submitted by the Highway Commissioner, or others in lieu thereof; (2) undertaking to make it the railroad's duty, in such event, to furnish materials and construct in accordance with the plans and specifications approved by the Corporation Commission; and (3) purporting to impose on the railroad one-half the total cost of the work done both by it within, and by the Highway Commission without, the right of way limits, and the obligation to maintain the portion within the right of way lines, except the surface of the roadway.

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The judgment of the Supreme Court of Appeals of Virginia, sought to be reviewed, was dated, filed and entered on the 12th day of January, 1933.

The application for appeal was presented on the 15th day of March, 1933.

V.

Nature of the Case and Rulings of the Court Bring the Case Within the Jurisdictional Provision Relied on.

From the quotation from and summary of pertinent provisions of the statute above, it will be observed that the statute contains no provision requiring the Highway Commissioner to give the railroad company

notice or to allow it a hearing before he makes his finding and determination that in his opinion public safety and convenience require the elimination of the grade crossing and the substitution of the overhead crossing at the expense, in part, of the railroad. It lays down no rule of law, sets no legislative standard, to control the arbitrary personal or official "opinion" of the Highway Commissioner that public safety and convenience require such elimination construction. It does not require the Highway Commissioner to take or consider or to give legal effect to evidence, to hold a hearing, or to give the railroad opportunity to object or to be heard on the merits of the fundamental question of public safety and convenience. It provides for no semblance of primary, procedural due process of law. It undertakes to confer on the Highway Commissioner, an administrative official, an uncontrolled and purely personal and arbitrary power to make a determination and requirement which will take the railroad's property, without notice, without hearing, without right to contest, without evidence, merely upon his *ex parte* opinion, by mere administrative fiat.

Moreover, there is no provision in the statute for appeal from the determination and requirement made by the Highway Commissioner or for a judicial review in any forum of the merits of his finding that in his opinion public safety and convenience require the overhead crossing to be provided. There is no provision in the statute law of Virginia for such appeal and judicial review. The Act of 1930, here drawn in question, undertakes not only to confer on the Highway

Commissioner the power to take the railroad's property by an arbitrary exercise of personal and uncontrolled discretion, by administrative fiat, and without notice and hearing, but also to make that exercise of arbitrary discretion final and unappealable and subject to no judicial review.

The only steps required by the statute to be taken by the Highway Commissioner, in order to create and finally impose upon the railroad the supposed legal "duty" to provide equipment and materials and construct, are:

> 1. That he determine in his *ex parte* opinion that public safety and convenience require the elimination construction;
>
> 2. That, after his opinion is formed and his determination made, he then notify the railroad in writing, stating particularly the point at which the existing grade crossing is to be eliminated and that the public safety or convenience requires it;
>
> 3. That he submit plans and specifications for the work.

Acting solely under the supposed authority of that statute, H. G. Shirley, the relator appellee, as Highway Commissioner of Virginia, without giving notice to appellant and without affording it a hearing, pursuant to no semblance of due process of law in the primary or procedural sense, but following only the steps set out in the statute, and acting merely in the forum of his own mind and discretion, determined by personal

or administrative fiat that in his opinion public safety and convenience required the elimination of an existing grade crossing of State Highway Route 12 with appellant's railroad near Antlers, Mecklenburg County, Virginia, and the substitution in lieu thereof of an overhead highway crossing over the track and right of way of appellant.

He thereupon gave appellant notice in writing, dated January 7, 1931, that he had formed that opinion and made that determination, with which notice he submitted plans and specifications for the work, and in which notice he called upon appellant to "proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted, within the right of way limits."

Appellant replied to that notice and requirement by letter dated January 20, 1931, in which it said that it did not agree with the Highway Commission's opinion that the public safety and convenience required the said elimination construction, and asserted that the Act of 1930 was unconstitutional and void. It advised that, "therefore, unless and until it should be finally determined by the courts that it is a valid statute, this Company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

Upon the receipt of appellant's letter of January 20, 1931, without any further intermediate handling with appellant, the Highway Commissioner, as relator for

the Commonwealth of Virginia, complainant, filed a complaint against appellant, as defendant, in the State Corporation Commission of Virginia, seeking an order of that Commission to compel the appellant to perform the supposed "duty," to provide all equipment and materials and to construct the overhead bridge, a duty alleged to have been imposed upon appellant by the foregoing acts of the Highway Commissioner under the Act of 1930.

The material allegations of the complaint were: that the Highway Commissioner, acting under authority of the Act of 1930, had in his official capacity ascertained and determined that the grade crossing should be eliminated and the overhead crossing substituted and that this was necessary for public safety and convenience; that he had given notice of that determination to appellant as required by the Act of 1930; that he had submitted plans and specifications for the work; that it thereupon became the legal duty of appellant to provide all equipment and materials and to construct the overhead crossing in accordance with the plans and specifications, and as he had called upon appellant to do; that appellant had failed and refused to obey and perform said duty, it asserting the claim of unconstitutionality of the statute; that the cost of the work when done would be divided half and half between the Commonwealth and appellant as provided by the Act of 1930; that the Corporation Commission had constitutional and statutory jurisdiction to receive the complaint, to ascertain and determine whether or not appellant had failed or refused or was failing to

comply with the said duty, and to impose fines and otherwise enforce performance by it of said duty.

The appellant demurred to the complaint on the grounds, as specifically detailed in the demurrer, that the complaint did not state a cause of action in that the Act of 1930 was unconstitutional, null and void as denying primary or procedural due process of law, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process clause of Article I, Section 11, of the Constitution of Virginia, in the respects particularly detailed in the demurrer and summarized hereinbefore in pointing out the defects in the statute, in that the acts of the Highway Commissioner pursuant to such unconstitutional statute were null and void and imposed no enforcible or constitutional legal duty on appellant, and that for the Commission to grant the prayer of the complaint would be beyond its jurisdiction and would take appellant's property without due process of law in violation of said constitutional provisions.

The Federal constitutional question was thus squarely, explicitly and in detail raised in the outset by the demurrer.

There was no issue of fact before the Corporation Commission. It had for decision only the squarely raised legal issue as to the constitutionality of the Act of 1930 and of the acts of the Highway Commissioner thereunder, and whether any constitutionally enforcible legal duty had been imposed on appellant thereby.

No question was raised by appellant of the substantive police power of the State. It has expressly admitted throughout the case the substantive police power to make reasonable requirements, enforcing uncompensated obedience thereto by railroads, to promote public safety and convenience by contributing their own property to the construction of grade crossing elimination structures reasonably necessary to protect the public, provided such requirements be imposed by due process of law in the primary or procedural sense.

The demurrer challenged the constitutionality of the Act of 1930, and of the acts of the Highway Commissioner thereunder, on the theory that it was repugnant to the Fourteenth Amendment in denying appellant due process of law in the primary or procedural sense, in undertaking to delegate to a single administrative officer the uncontrolled and arbitrary discretion and power to make such a requirement in a particular instance, without notice, without hearing or right to be heard, hence by necessarily arbitrary administrative fiat, final and irrevocable in its nature and subject to no appeal or judicial review on the merits.

The Corporation Commission, after argument and reargument, handed down an elaborate opinion on March 8, 1932, in which it held that, because the Act of 1930 was a grade crossing elimination statute enacted under the police power, it was constitutional and valid although it denied appellant right to notice and

hearing before the determination and requirement made by the Highway Commissioner became final, and although it denied appellant appeal and judicial review of the merits thereof thereafter, making the Highway Commissioner's administrative fiat final and irrevocable. The substance and effect of the elaborate opinion is that, although admitting that such a statute would be repugnant to the Fourteenth Amendment if passed under the State's taxing power, or its power of eminent domain, or its power to impose assessments for local benefits, yet the police power of the State is so transcendental and farreaching as to be free from the procedural requirements of due process which admittedly restrain all other manifestations of the State's power.

Upon that opinion, the Corporation Commission overruled the demurrer. The appellant stood upon the demurrer. Thereupon the Commission ordered appellant to "forthwith proceed to provide all equipment and material, and to construct" the highway bridge within its right of way limits, pursuant to the Highway Commissioner's requirement, but stayed its own order pending appeal.

Under statutes conferring right of appeal from any order of the Corporation Commission, appellant appealed from the Commission's judgment and order direct to the Supreme Court of Appeals of Virginia, its assignments of error bringing in question the validity of the Act of 1930, and of the acts of the Highway Commissioner and the enforcing order of the Corporation

Commission thereunder, as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States (and to the like clause of Article I, Section 11, of the Constitution of Virginia), on the same grounds asserted and relied on by appellant in its demurrer below.

The issue before that court was the same as before the Corporation Commission, that is, as to constitutionality of the Act of 1930, and of the determination and requirement of the Highway Commissioner and enforcing order of the Corporation Commission depending solely on that Act for authority, in view of the denial by that statute to appellant, and of the Highway Commissioner's denial to appellant pursuant to the terms of the statute, of primary due process of law, of due process in the procedural sense.

The Supreme Court of Appeals of Virginia decided, by a divided court, Campbell, Chief Justice, and Epes, J., dissenting, in favor of the validity and constitutionality of the statute, as against appellent's assertion of its repugnancy to the due process clause of the Fourteenth Amendment, in the opinion and judgment rendered January 12, 1933, here appealed from.

The majority of that court adopted the view of the Corporation Commission, that the State's police power is a power of such broad and untrammelled scope as to be free from the procedural requirements of due process of law, in the primary sense of that expression in the Fourteenth Amendment, and that it is constitutional for the State, in an enactment made under the

police power, to delegate to an administrative official the power to make a final and irrevocable determination and requirement, obedience to which will require appellant to expend its own money and devote part of its own right of way to a public purpose, without notice and hearing and without any legal right to notice and hearing given by the law itself.

Appellant in that court, conceding entirely the substantive police power of the State to force a railroad to expend its own property for reasonably necessary grade crossing eliminations, where such requirements are imposed after notice and full hearing as matter of right and with right to judicial review on the merits, as decided by this Court in the line of cases represented by *New York, etc., Ry Co.* v. *Bristol,* 151 U. S. 556, *Erie R. R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, and *Lehigh Valley, etc., R. Co.* v. *Commissioners,* 278 U. S. 24, pointed out that in every one of that line of cases the statute involved complied fully with the procedural requirements of the due process clause of the Fourteenth Amendment, made notice and hearing before the imposition of the requirement obligatory and a matter of right, conferred the right of review on the merits after the requirement was made, and that the requirements in all those cases were imposed with strict compliance with these requisite procedural guaranties. It further pointed out that every grade crossing elimination statute which it had found in the books, except the Virginia Act of 1930, made the same careful provisions for notice, hearing,

and review, and that the Virginia Act was entirly unique in its denial of the procedural guaranties.

As to this the Corporation Commission, in its opinion below, had said:

> "It is true that the statutes involved in those cases did require such notice, and the courts in considering such questions and the contention that the statutes deprived the defendant of property without due process of law, referred to the fact that the statutes did provide for notice or an opportunity to be heard; but the fact that they did so is not to be taken as a holding that notice to or an opportunity to be heard was essential to due process of law.
>
> "While nearly all of the statutes involving the alteration or abolition of grade crossings, whenever in the opinion of the administrative body the public safety or convenience requires such alteration or abolition, provide for a hearing, yet there is no case which holds that notice of a hearing and an opporthunity to be heard are absolutely necessary."

The Supreme Court of Appeals did not expressly advert in its opinion to the distinction drawn between this statute and the statutes involved in the decided cases, but it held that the Virginia Act was valid, although it denied right to notice and hearing and conferred on an administrative official power to make a *final* requirement that the railroad expend its property, time and labor, without notice and hearing. It relied upon broad statements of this Court, made in cases involving only the substantive scope of the police power,

not the procedural limitations imposed thereon by the due process clause, such as the statement in *New Orleans Public Service Co.* v. *City of New Orleans,* 281 U. S. 682, that, "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law." And it overruled appellant's contention that the word "legitimate" in such statements implies the necessity of procedural due process, notice and hearing as matter of right, and right to review on the merits, where the State undertakes to delegate the exercise of its police power to administrative officials.

VI.

Cases Believed to Sustain the Jurisdiction.

As to the repugnancy of the statute to the Fourteenth Amendment to the Constitution of the Unied States, in denying due process of law in the primary or procedural sense, appellant relies on the following cases, *inter alia*:

Yick Wo v. *Hopkins,* 118 U. S. 356;
Chi., M. & St. P. R. Co. v. *Minnesota,* 134 U. S. 416;
Smythe v. *Ames,* 169 U. S. 466;
Parsons v. *District of Columbia,* 170 U. S. 45;
Chi., M. & St. P. R. Co. v. *Tompkins,* 176 U. S. 167;

Security Trust & Sav. Co. v. *Lexington*, 203 U. S. 323;
Tracy v. *Ginzberg*, 205 U. S. 127;
Central Ga. R. Co. v. *Wright*, 207 U. S. 127;
Missouri P. R. Co. v. *Nebraska*, 217 U. S. 196;
Washington ex rel. Oregon R. & N. Co. v. *Fairchild*, 224 U. S. 510;
Eubank v. *Richmond*, 226 U. S. 137;
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413;
Embree v. *Kansas City, etc., Road District*, 240 U. S. 242;
Witherell v. *Ruecking Construction Co.*, 249 U. S. 62;
Oklahoma Operating Co. v. *Love*, 252 U. S. 331;
Turner v. *Wade*, 254 U. S. 64;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Truax v. *Corrigan*, 257 U. S. 312;
Wichita R. R. & L. Co. v. *Public Utilities Commission*, 260 U. S. 48;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Small v. *Sugar Refining Co.*, 267 U. S. 233;
Connally v. *General Construction Co.*, 269 U. S. 385;
Browning v. *Hooper*, 269 U. S. 396;
Clive v. *Frick Dairy Co.*, 274 U. S. 445;
Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116;
Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673;

Marx v. *Maybury*, 36 F. (2d) 297;
Chi., M. & St. P. R. Co. v. *Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162.

As to the right of appeal to this Court, cases believed to sustain the jurisdiction are:

Saltonstall v. *Saltonstall*, 276 U. S. 260;
Miller v. *Schoene*, 276 U. S. 272;
Nashville, C. & St. L. Ry. v. *White*, 278 U. S. 456;
Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503;
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 407;
Abie State Bank v. *Bryan*, 282 U. S. 765, 767-768, 771-773;
Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 14;
Lawrence v. *State Tax Commission*, 286 U. S. 276, 278-279;
Advance-Rumely Thresher Co. v. *Jackson*, 287 U. S. 283, 77 L. Ed. (Adv.) 192, decided Dec. 5, 1932;
Detroit International Bridge Co. v. *Corporation Tax Appeal Board*, 287 U. S. 295, 77 L. Ed. (Adv.) 197, 198, decided Dec. 5, 1932;
Atlantic Coast Line R. Co. v. *Ford*, 287 U. S. 502, decided Jan. 9, 1933;
Guaranty Trust Co. of N. Y. v. *Blodgett*, 287 U. S. 509, decided Jan. 9, 1933.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 237*a* of the Judicial Code, 28 U. S. C. 344*a*, as amended.

Respectfully submitted,

THOMAS B. GAY,
SIDNEY S. ALDERMAN,
Counsel for Appellant.

S. R. PRINCE,
Of Counsel.

FILE COPY

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APR 15 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 26

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. F. HALL,
BROCKENBROUGH LAMB,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 872

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee, Commonwealth of Virginia, at the relation of H. G. Shirley, Highway Commissioner, submits this statement and motion pursuant to paragraph 3 of Rule 12 of the Revised Rules of this Court, effective September 1, 1932.

Report of the Opinion Appealed From.

The opinion of the Supreme Court of Appeals of Virginia rendered January 12, 1933, from which appeal is sought, is reported under the style "*Southern Railway Company* v. *Commonwealth*," in 167 S. E. (S. E. Adv. Shs. Vol. 167, No. 6, March 2, 1933, pages 578-583, inclusive). Citation in the Virginia official reports is not yet available.

Appellee's Statement of Matters and Grounds Making Against the Jurisdiction of this Court.

The power here challenged with respect to the elimination of grade crossings was conferred upon the State Highway Commissioner in substantially the same form of procedure in the year 1924 (Acts of Assembly, 1924, Chap. 120, page 146; Michie's Code of 1924 (unofficial), Sec. 3974*a*). There were amendments not here material in 1926 (Acts of Assembly 1926, Chap. 213, page 397; Michie's 1926 Suppl. Sec. 3974*a*).

The statute in the precise form here under attack was approved and enacted February 27, 1930 (Acts of Assembly, 1930, Chapter 62, page 73; also cited Michie's Virginia Code of 1930 (unofficial), Section 3974*a*).

The appellant's attack upon this statute as presented before the State Corporation Commission of Virginia and upon appeal therefrom in the Supreme Court of Appeals of Virginia, was upon two distinct grounds, namely:

(1) That the said statute was unconstitutional for the reason that it undertook to delegate to the State

Highway Commissioner legislative powers of a character which cannot be delegated; and

(2) That the said statute was unconstitutional for the reason that it made no provision for notice to the railroad and an opportunity to be heard on the point whether or not the particular grade crossing was to be eliminated.

In appellant's petition for appeal to this Court, in its assignment of error and in its jurisdictional statement, the appellant does not segregate these two points of attack but makes reference to both points in combined form.

1. Appellant's First Point Presents no Federal Question.

No federal question is presented or involved under point one, for the reason that if the Commonwealth of Virginia has the power through any branch of its government to accomplish the result complained of, then the form and manner by which the result is accomplished is clearly within the discretion of the State authorities, free of federal control.

The delegation is to the Highway Commissioner, who constitutes an administrative department of the Commonwealth, created by and acting under statutory authority, and exercising police power conferred by statute (Code 1930, Sections 1969*a*-1969*p*). This police power is conserved by Section 159 of the Constitution of Virginia, providing that

> "the exercise of the police power of the State shall never be abridged, nor so construed as to

> permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State."

And by Section 164 of the Constitution of Virginia, it is provided:

> "The right of the Commonwealth, *through such instrumentalities as it may select*, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor shall never be surrendered or abridged."

On these points reference is made to the published opinion of the court below, at pages 579 and 582.

The pertinency of Section 164 of the Virginia Constitution, above quoted, is apparent when the language of *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 225, is considered:

> "We shall assume that when * * * a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."

It is not appellee's position that the power here delegated is either legislative or judicial, but merely a legally delegated administrative discretion. But in view of the Virginia Constitution, both might be granted, and granted together, without raising any federal question.

The proposition that appellant's first point, as above stated, presents no federal question finds support in one of the leading grade crossing elimination cases:

Erie R. R. Co. v. *Public Util. Commrs.*, 254 U. S. 394, at page 413:

> "This Court has no concern with the question how far legislative or *quasi*-legislative powers may be delegated to a commission or board."

2. No Jurisdiction of Appellant's Second Point.

Appellant's second point of attack is that the Virginia statute denies due process of law required by the Fourteenth Amendment of the United States Constitution. The appellant does not claim that the Commonwealth of Virginia lacks substantive power, but on the contrary expressly admits it. Appellant's point is that no provision is made for due process of law in what the appellant calls the primary or procedural sense; which in brief, is simply that the statute makes no provision for *notice* and a *hearing* upon the question whether the particular crossing shall be eliminated. The statute does make full provision for notice and hearing in a court proceeding upon the design, cost and details of the proposed construction to accomplish separation of the grades.

The appellant admits that *the legislature* of the Commonwealth may, *without notice or hearing,* make a direct legislative determination to eliminate a grade crossing. This admission has been made throughout the briefs in the courts below and is specifically pointed out and quoted in the published report of the opinion appealed from on page 580.

This admission of appellant is doubtless intended also to apply to such procedure without notice or hearing by a subordinate legislative body for example, a municipal council. But it is interesting to note that no such *admission* was made by the railroad in *Chicago, Burlington and Quincy Railroad* v. *Nebraska,* 170 U. S. 57, where the delegation was to the mayor and council of Omaha City. There the railroad claimed that such procedure was (page 76) "arbitrary, without notice and contrary to plain principles of justice and equality." But this Court held (page 76) that the council "was not directed to proceed judicially, but to exercise a legally delegated discretion," and that neither notice nor a hearing were prerequisites (p. 77).

As to what constitutes due process of law in such cases there is no difference in principle between direct legislative action, either by the legislature or a subordinate legislative body, such as a city council, on the one hand, and, on the other, action by delegation to an administrative *board or official* of legal discretion to ascertain a state of facts upon which the operation of the statute depends, conformably to a legislative guide. The admission of the appellant that power resides in the Commonwealth of Virginia to eliminate a grade crossing by *direct legislation,* without notice or hearing, is tantamount to an admission that no federal question is involved in this case.

That there is no difference in principle, so far as due process of law is concerned, between these two methods of proceeding, is shown by the following authorities:

Woodruff v. *Catlin*, 54 Conn. 277, 295:

> "That the legislature of this State has the power to do all this * * * and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

The above case and quotation were approved in *New York & New England R. Co.* v. *Bristol*, 151 U. S. 556, 567. In that case the delegation of discretion was not to a subordinate legislative body but to a board of railroad commissioners, an administrative body. The railroad strongly urged that this board "prejudged" the case, that there was no notice given or hearing accorded on the point whether the particular crossing should be eliminated, that for lack of notice and a hearing the claim that it had its day in court was "a hollow mockery." (See 151 U. S. at pages 564 and 565.) This Court said (page 571) that railroads are subject to legislative control in all respects necessary to protect the public, and

> "the State has power to exercise this control through boards of commissioners; * * * nor are they (railroads) thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and (that) the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this Court on the ground of an infraction of the Constitution of the United States."

Also *Health Dept. of the City of New York* v. *Trinity Church*, 145 N. Y. 32; 27 L. R. A. 710, 713:

> "If, in such case, the enforcement of the direct command of the legislature were not to be preceded by any hearing * * * no provision of the state or federal constitution would be violated. The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle nor would it be necessary to provide that the board should give notice and afford a hearing * * * before it made such order."

This leading New York case has been approved *on this point* by *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57, 76, 77, the passage we have quoted from the New York case being quoted with approval on page 77. It is plain that no difference exists between legislation, direct or through a city council, and delegation of discretion to an administrative board. The requirements of due process are the same and in neither case is notice or hearing a prerequisite.

3. No Taking of Private Property is Here Involved.

The enforcing of police regulations of this character does not involve any *taking* or depriving of property, and therefore no notice or hearing is required by the due process clause of the Fourteenth Amendment. See published report of the opinion of the lower court at page 582.

The point is also passed on in *Mugler* v. *Kansas*, 123 U. S. 623, 668:

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. * * * Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. * * * The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."

To the same effect:

Detroit, etc., R. Co. v. *Osborn,* 189 U. S. 383;

Chicago, etc., R. Co. v. *Tranbarger,* 238 U. S. 67;

Northern Pacific R. Co. v. *Puget Sound, etc., R. Co.,* 250 U. S. 332;

New Orleans Public Service Co. v. *New Orleans,* 281 U. S. 682.

The case last cited was a grade crossing regulation case and the following is from page 687 of the opinion:

> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law (citing cases)."

4. There is no Showing Against this Police Regulation.

In *Erie R. R. Co.* v. *Public Util. Commrs.*, 254 U. S. 394, it was said of the elimination of railroad grade crossings on pages 410, 412:

> "That is one of the most obvious cases of police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires * * *. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil."

Being an obvious exercise of police power in the interest of the public safety, all that is required is that the means employed have a substantial relation to the purpose to be accomplished, and that there be no *arbitrary* interference with private rights; *Missouri, etc., Co.* v. *Omaha*, 235 U. S. 121.

The same idea is thus expressed in the recent case of *New Orleans Public Service* v. *New Orleans*, 281 U. S. 682, 686:

> "The burden is upon the appellant to show that *having regard to the facts disclosed by the record,* removal of the existing viaduct and construction of the crossings are so clearly *unreasonable* and *arbitrary* as to amount to depriving the appellant of its property without due process of law."

The public safety is so closely related to the elimination of grade crossings that to elaborate would be to labor the obvious. The substantial relation of the means employed to the purpose to be accomplished is apparent.

There is no basis whatever in this record to suggest any *arbitrary* exercise of the legally delegated discretion. The record consists of the complaint of the Highway Commissioner and the *demurrer* of the appellant railway thereto. No evidence was taken and there is no basis whatever in the record either to sustain or to suggest any arbitrary or unreasonable exercise of the power. It is in the arguments of counsel alone that we find any suggestion of "personal" or "arbitrary" exercise of power; or any suggestion that either the means employed or the results sought have any feature of unreasonableness or hardship upon the railroad, much less spoliation or confiscation of property.

5. Appellant's Cases Differentiated.

Consideration of well recognized distinctions readily differentiates the cases on which appellant relies:

1. A distinction is to be drawn between controversies between man and man in which the proceedings are

judicial in character, and cases where the government through one of its established agencies is exercising the police power.

Cooley, Cons. Lim. (8th ed.), pp. 740, 741;
Breiholz v. *Pocahontas County,* 257 U. S. 118.

This distinguishes the following cases relied on by appellant:

Tracy v. *Ginzberg,* 205 U. S. 170;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413;
Truax v. *Corrigan,* 257 U. S. 312;
Small v. *Sugar Refining Co.,* 267 U. S. 233.

A corollary distinction between delegation to private persons (or delegation to whim or fancy without any legislative guide whatever), and delegation to an agency of government, serves to distinguish the zoning ordinance cases:

Eubank v. *Richmond,* 226 U. S. 137;
Washington ex rel.; &c., v. *Roberge,* 278 U. S. 116.

2. Wholly different considerations apply in cases where there is *a taking* of private property for public use, from those applicable where there is a proper exercise of the police power.

We have already given the authorities.

This distinguishes appellant's cases where there was a taking or depriving of property, such as where spurs, additional trackage or other facilities are required:

Missouri P. R. Co. v. *Nebraska*, 217 U. S. 196;
Washington ex rel., &c., v. *Fairchild*, 224 U. S. 510;
Chi., M. & St. P. R. Co. v. *Board*, 76 Mont. 305.

As was said in *Washington ex rel., &c.*, v. *Fairchild*, *supra*, an order requiring the railroad to make a track connection was "not a mere administrative regulation, but it was a taking of property."

3. The delegation of purely arbitrary discretion without legislative guide or standard is very different from delegating a legal discretion with such a guide or standard (though it be expressed in very general terms).

See

Thompson v. *Smith*, 155 Va. 367, 381;
Mutual Film Corpn. v. *Ohio Indus. Com.*, 236 U. S. 239.

This differentiates appellant's cases:

Yick Wo v. *Hopkins*, 118 U. S. 356;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Small v. *Sugar Refining Co.*, 267 U. S. 233;
Connally v. *Gen. Cons. Co.*, 269 U. S. 285;
Cline v. *Frick Dairy Co.*, 274 U. S. 445;
Chi., M. & St. P. R. Co. v. *Board*, 76 Mont. 305.

4. There is a distinction to be noted between the power to regulate inherent or common rights, such as the conduct of an ordinary business, and power to regulate extraordinary privileges, where the right is derived *ex gratia*.

This elementary principle needs no authority (see *Gundling* v. *Chicago*, 177 U. S. 183, 187, distinguishing *the Yick Wo case; Cutrona* v. *Mayor*, 14 Del. 208, making same distinction; also *Thompson* v. *Smith*, 155 Va. 367, 378), yet it serves as a complete differentiation of the following authorities cited by appellant:

Yick Wo v. *Hopkins*, 118 U. S. 356;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Cline v. *Frick Dairy Co.*, 274 U. S. 445;
Marx v. *Maybury*, 36 F. (2d) 397.

5. Rate making powers and the procedure whereunder they are exercised follow well settled principles. Common carriers are in such matters *deprived* of property, as distinguished from merely regulated in the use of property. Whether judicial or legislative in nature, or both (Cf. *Chi., M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458, judicial, with *Prentis* v. *A. C. L.*, 211 U. S. 210, 226, legislative), it is clear that the principles of procedure are rather analogous to additional trackage requirements and tax proceedings than to mere police regulations having to do with mode of use. No one would now question that both notice and opportunity to be heard are required in this class of cases.

Yet the following rate making cases are cited by appellant:

Chi. M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418;
Smythe v. *Ames*, 169 U. S. 466;

Chi., M. & St. P. R. Co. v. *Tompkins*, 176 U. S. 167;
Interstate Com. Com. v. *L. & N. R. Co.*, 227 U. S. 88;
Oklahoma Operating Co. v. *Love*, 252 U. S. 331;
Wichita R., &c., Co. v. *Pub. Util. Com.*, 260 U. S. 48.

6. Taxation and police regulation are wholly different. The former takes unoffending property and appropriates it to public use; the latter takes no property but regulates its use so as to prevent offense. "The assessment of a tax is action judicial in its nature;" *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, 138. Multiplication of authorities is useless.

The taxation cases cited by appellant are wholly aside from the mark:

Parsons v. *District of Columbia*, 170 U. S. 45;
Security Trust & Sav. Co. v. *Lexington*, 203 U. S. 323;
Central Georgia R. Co. v. *Wright*, 207 U. S. 127;
Embree v. *Kansas City, &c., Dist.*, 240 U. S. 242;
Withnell v. *Ruecking Cons. Co.*, 249 U. S. 63;
Turner v. *Wade*, 254 U. S. 64;
Browning v. *Hooper*, 269 U. S. 396;
Brinkerhoff-Faris Tr. Co. v. *Hill*, 281 U. S. 673.

In the foregoing classification we have undertaken to distinguish, on one or more grounds, each of the cases upon which appellant relies to sustain its contention that the Virginia statute under attack is repugnant to the Fourteenth Amendment.

Conclusion of Statement Opposing Jurisdiction.

It is respectfully submitted that the propriety of delegating discretion of this kind to an administrative department of the State involves no federal question; and it is further submitted that upon this record there is no showing whatever, or any attempt to show, anything unreasonable, arbitrary or confiscatory in the police regulation promulgated. And in the absence of such showing by the record no question of due process of law under the Fourteenth Amendment is presented.

Appellee's Motion to Dismiss or Affirm.

The appellee moves the court to dismiss or affirm upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

It has for many years been the established legislative and judicial policy of the Commonwealth of Virginia to eliminate all grade crossings whenever and as soon as it is reasonably practicable to do so. See published reports of the opinion of this case in the court below, page 579. *All grade crossings are under the potential ban of the policy and statute.* Realizing that it is both financially and physically impossible to eliminate all such crossings at once, the statute has delegated to the State Highway Commissioner, the administrative arm of the state having control of highways, authority to determine in his official capacity when in the interest of public safety or convenience any particular crossing is to be eliminated. This delegates to this administrative branch of the government neither legislative nor judicial power, but merely the

duty to exercise a legally delegated discretion in conformity with the legislative guide expressed in the statute; *Chicago, etc., R. R.* v. *Nebraska,* 170 U. S. 57, 76:

> "The latter (that is, the city council) was not directed to proceed judicially but to exercise a legally delegated discretion."

The case is in no way analogous to the taxation, rate fixing, or additional trackage cases relied on by appellant, which involve the *taking* of private property in proceedings of judicial nature; nor to the other cases relied on, where an arbitrary power is delegated, under no legislative guide whatever, to regulate an ordinary business and interfere with inherent rights. The police regulation here involves no *taking* of property, no *judicial* hearing on the point of elimination, and regulates not an ordinary business or an inherent right but one derived *ex gratia.* The instant case is rather analogous to *Breitholz* v. *Pocahontas County,* 257 U. S. 118, where power was delegated to a board to determine without notice or hearing when repairs to a drainage system are necessary; or to the administrative regulations approved in *Morris* v. *Duby,* 274 U. S. 135, in which power was delegated to the State Highway Commission of the State of Oregon to fix maximum weights and speeds of vehicles on highways. Peculiarly applicable here is the following from the case last cited, page 144:

> "In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the highway commission upon this question which is committed

to their decision as against merely general averments denying their official finding."

Grade Crossing Elimination Cases.

But arguments by analogy are unnecessary here. The principles laid down as applicable to cases of this precise character amply support the statute of Virginia and the procedure adopted thereunder. Examination of these cases demonstrates that there is nothing of novelty in this appeal. It involves questions already definitely and repeatedly determined. It is necessary only to cite the grade crossing cases in which the very questions here raised have been decided by this Court against the appellant's contention. In these cases many other points upon which the railroads have unsuccessfully endeavored to rely have also been disposed of, such as impairment of the obligation of contracts, in the charter or elsewhere, interference with interstate commerce, and the like—none of which are here relied on or involved:

New York, etc., R. R. Co. v. *Bristol,* 151 U. S. 556;

C. B., etc., R. R. Co. v. *Nebraska,* 170 U. S. 57;

Northern Pacific R. Co. v. *Duluth,* 208 U. S. 583;

St. Paul, etc., R. Co. v. *Minnesota,* 214 U. S. 497;

C., I. & W. R. Co. v. *Connersville,* 218 U. S. 336;

Chicago, etc., Ry. v. *Minneapolis,* 232 U. S. 430;

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548;

Great Northern R. Co. v. *Clara City,* 246 U. S. 434;

Erie R. R. Co. v. *Public Util. Commrs.,* 254 U. S. 394;

Southern Ry. Co. v. *Durham*, 266 U. S. 178;
Lehigh Valley R. Co. v. *Board of Public Utility*, 278 U. S. 24;
New Orleans Public Service v. *New Orleans*, 281 U. S. 682.

Consideration of the principles laid down in these grade crossing elimination cases by this Court amply justify this motion to dismiss or affirm the present appeal. In the earlier cases it was vigorously asserted by the railroads that notice and a hearing was required and had been denied them but it was expressly held that no notice or hearing was required. The point has not been urged in the later cases. It was embalmed in the earlier cases and should not be revived.

We have not found, nor has appellant cited, any grade crossing elimination case which either holds or intimates that previous notice and an opportunity to be heard is a constitutional requirement before such a police regulation may be promulgated.

This Case is Upon a Demurrer.

The instant case arises upon the complaint of the Commonwealth of Virginia, at the relation of the State Highway Commissioner, filed in the State Corporation Commission of Virginia. This complaint makes among others the following allegations:

> "(2) The undersigned relator pursuant to the powers vested in him and duties imposed upon him by law, and particularly pursuant to the provisions of an act of the General Assembly of Virginia approved February 27, 1930, identified as Chapter 62, Acts 1930, amending

and re-enacting previously existing acts of the same and similar purport, has in his official capacity ascertained and determined that the existing crossing at grade of State Highway Route 12, Project 460-E, by the railroad owned and/or operated by the Southern Railway Company near Antlers, Mecklenburg County, Virginia, should be eliminated and an overhead crossing substituted therefor, and that the elimination of such existing crossing at grade and the substitution therefor of an overhead crossing is necessary for the public safety and convenience,, and pursuant thereto, notified, in writing the said Southern Railway Company stating particularly the point at which the existing grade crossing is to be eliminated and that the public safety and convenience required that the said existing grade crossing be eliminated and a crossing above the tracks of the said railroad constructed. • • •

"(3) The elimination of the said crossing at grade and the substitution therefor of an overhead crossing had been for some time a subject of negotiation between your relator in his official capacity and the said railroad company, and the said railroad company had pursuant to and in the course of such negotiations prepared and submitted to your relator plans for the said work which were approved by your relator. In compliance with the aforesaid act of the General Assembly of Virginia, your relator under date of January 7, 1931, submitted to the said Southern Railway Company plans and specifications of the proposed work, they being the same as theretofore submitted by the said railroad company and approved by your relator."

To this complaint the appellant interposed a demurrer, thereby admitting all the allegations of the complaint. The appellant stands upon this demurrer. No evidence was offered showing or tending to show that the ruling was "personal," or "arbitrary," or "oppressive," or that the expense involved was out of proportion to the result to be accomplished. It is upon this record that the case here stands. That the ruling was arbitrary, oppressive or confiscatory does not appear and is not even suggested by the record. In fact the statute itself provides a very practical consideration which negatives any such idea, namely: The Commonwealth is to bear one-half of the expense attendant upon the separation of the grades.

In order to seek the protection of the due process clause of the Fourteenth Amendment the burden of proof is upon the appellant to show that the requirement of the Highway Commissioner made pursuant to the statute is utterly unreasonable, arbitrary, oppressive and confiscatory. No attempt in this record has been made by the appellant to bear this burden. Certainly it cannot be carried by the mere interposition of a demurrer. Every presumption is in favor of the validity of the statute and of the administrative ruling made pursuant thereto; see report of the published opinion below, page 580.

The appellant has overlooked several important considerations:

(1) The statute is the expression of a well settled policy of the Commonwealth to eliminate grade crossings. This might be done at the sole expense of the

railroads. The power of the Commonwealth has been most considerately exerted as respects sharing the cost and also as respects the gradual perfection of the policy, as the public safety demands in the sound official judgment of the administrative department having control and supervision of the highways of the State.

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts;" *Missouri, etc., Ry. Co.* v. *May,* 194 U. S. 367.

(2) It is not necessary for notice and hearing to be accorded by the statute to prevent arbitrary, oppressive or confiscatory exercise of the power conferred by the statute upon the Highway Commissioner; because if the power is abused "equity's long arm will stay his hand," as is said in the published report of the opinion in the case in the lower court on page 582.

And to the citations of authority for this proposition there stated, should be added *Lehigh Valley R. Co. v. Board,* 278 U. S. 24, from which we quote as follows (page 35):

> "It is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined, not only as violations of the Fourteenth Amendment, but also as forbidden by the Transportation Act.
>
> "* * * It was certainly not intended by the Transportation Act to take from the states or

> to thrust upon the Interstate Commerce Commission investigation into *parochial matters* like this, unless by reason of their effect on economical management and service, their general bearing is clear. *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713. The latter case makes a distinction between the local character of the usual elimination of grade crossings and the vital character from the standpoint of finance of the investment of large sums in the erection of a union station."

And from page 40:

> "But, if for any reason that remedy, as defined in those decisions should not be available, or be inadequate, it would seem to be clear that resort then might be had to the Court of Chancery."

It is submitted that the record presents no question arising under the Fourteenth Amendment of the United States Constitution, and that the motion to dismiss or affirm should be granted because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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(3271)

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APR 15
CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1932.

No. [redacted] 26

SOUTHERN RAILWAY COMPANY, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of H. G. SHIRLEY, Highway Commissioner, *Appellee*.

Appeal from the Supreme Court of Appeals of the State of Virginia.

BRIEF OF APPELLANT, UNDER RULE 7, PARAGRAPH 3, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM, UNDER RULE 12, PARAGRAPH 3.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. ——

SOUTHERN RAILWAY COMPANY, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of H. G. SHIRLEY, Highway Commissioner, *Appellee*.

Appeal from the Supreme Court of Appeals of the State of Virginia.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

In connection with his statement asserting grounds making against the jurisdiction of this Court, filed under Rule 12, paragraph 3, the appellee has included a motion to dismiss or affirm. Such motion was served on appellant on March 28, 1933. Appellant, within twenty days after such service, files this brief, pursuant to Rule 7, paragraph 3, opposing the motion to dismiss or affirm.

The motion to dismiss or affirm is predicated solely upon the assertion that the federal constitutional question raised by the appeal is "so unsubstantial as not to need further argument." And the appellee's "Statement Opposing Jurisdiction" is confined to the same assertion, that there is no substantial merit in the federal constitutional question raised. There is no denial that appeal is the correct method of review here if the constitutional question is substantial. There is no denial that both the Corporation Commission and the Supreme Court of Appeals of Virginia treated the question of the constitutionality, under the due process clause of the 14th Amendment, of the state statute involved as having been properly raised for their decision and as being determinative of the case. There is no denial that both the commission and the court below passed upon that question and determined it in favor of the validity of the state statute. There is no denial that the question is properly preserved and brought here by the appeal papers. There is no denial of the technical jurisdiction of this Court by this appeal under the Judicial Code.

The only assertions against jurisdiction here, or for dismissal or affirmance, are that on the merits the decisions below were correct, that the statute of Virginia and the acts of the Highway Commissioner and the order of the Corporation Commission thereunder do not conflict with the 14th Amendment. Under the circumstances, this brief opposing the motion to dismiss or affirm, under Rule 7, paragraph 3, must necessarily address itself to the merits. There is nothing else to which it can be addressed.

In limine we suggest that the mere fact that the Corporation Commission needed a most elaborate opinion of 98 printed pages (R. 71-170)* to answer the constitutional attack of appellant, and the mere fact that the Supreme Court of Appeals of Virginia (R. 174-192) dealt with it

*Since the record here has not yet been reprinted, record references in this brief are to the pages of the record in the court below and to manuscript additions.

as a serious constitutional question under the 14th Amendment and that the Chief Justice and another justice of that court dissented from the holding of constitutionality, are *ipso facto* sufficient not only to show that color of substantiality which is pertinent at this stage (*Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36, 49; *Milheim, et al. v. Moffatt Tunnel Improvement District*, 262 U. S. 710; 716-717), but also to show that a very serious question is raised under the 14th Amendment.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Appeals of Virginia, rendered the 12th day of January, 1933, has not yet been officially reported. It is contained in the record. (R. 174-192.) It may be found in 167 S. E. (adv.) 578-583.

II.

GROUNDS OF JURISDICTION OF THE COURT.

Paragraph 1 of Rule 12 has been complied with in appellant's Jurisdictional Statement, which sufficiently shows the grounds of the jurisdiction of this Court on appeal.

III.

THE FEDERAL CONSTITUTIONAL QUESTION RAISED.

We may restate the federal constitutional question raised. It is:

> Is it constitutional under the due process clause of the 14th Amendment, in the primary or procedural (adjective) sense of that clause, for a state, in a statute passed under its police power, to delegate to an individual administrative officer, a highway commissioner, the power, without notice or hearing to the rail-

road, without taking evidence, without following any semblance of legal procedure, to determine that public safety and convenience require the elimination of a particular existing railroad-highway grade crossing by the building of a highway overpass over the railroad to separate the grades, basing his determination solely upon his personal *ex parte* "opinion," and upon such determination alone, without notice or hearing or other proceeding, to require the railroad to furnish equipment and materials and part of its right of way and to construct, at its own expense in part, such overhead bridge for the highway, and to make that requirement final and impose a final legal duty on the railroad to obey it, without any provision for administrative, quasi-judicial, or judicial review of the merits of the question of whether public safety and convenience require the elimination, the railroad's only right of appeal being to appeal to the Corporation Commission for a revision of the plans for the structure, not to review the merits of the determination; and is such a determination and requirement, so made, competent under the 14th Amendment to impose a valid legal duty upon the railroad to obey.

The court below, by a divided court, answered the question in the affirmative. The mere statement of the question would seem to demand a negative answer. It would seem clear that the state cannot by statute delegate to an administrative officer the power to make an adjudication, determination and requirement, resulting in a taking of appellant's property, without notice, without hearing, without evidence, by mere administrative fiat, an authority which, as this Court declared in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, is "possessed by no other officer, administrative body, or tribunal under our government"; an authority which, as this Court there said, "however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary power."

IV.

SPECIFICATION OF ASSIGNED ERRORS URGED.

The federal constitutional question above stated is the one question raised by the one assignment of error and it is here urged. The assignment is (R. 195-196):

> "The Supreme Court of Appeals of Virginia erred in holding that Chapter 62, Acts of Virginia 1930, approved February 27, 1930, and the proceedings pursuant thereto whereunder the State Highway Commissioner of Virginia determined that in his opinion the elimination of an existing grade crossing of appellant's railroad and right of way and a state highway at Antlers, Virginia, was necessary for public safety and convenience and required appellant to provide all equipment and materials and construct, at its own expense in part, an overhead bridge to carry the state highway across and above appellant's right of way and track, are, as applied to appellant, valid and constitutional, and in affirming the decision by the State Corporation Commission of Virginia holding that said statute and said determination and requirement made by the State Highway Commissioner are valid and constitutional and impose an enforcible and constitutional legal obligation on appellant to obey said requirement and ordering appellant to obey and perform said requirement; the error being that the said statute is, and the said determination, requirement and enforcing order based thereon are, unconstitutional, null and void, taking appellant's property without due process of law, in violation of appellant's rights under the 14th Amendment to the Constitution of the United States, in that said statute by its terms undertakes to delegate to the State Highway Commissioner, an administrative official, the power to make, and that he did, pursuant solely to the supposed authority of said statute, make said determination and said requirement, without previous notice to appellant and without hearing afforded appellant as required by due process of law, without taking or considering evidence, based solely upon his personal *ex parte* opinion, and as the expression of a

purely arbitrary administrative fiat, and in that the said statute makes no provision for judicial review on the merits of his said determination as to public safety and convenience and makes the said determination final and irrevocable, and undertakes to create and impose upon appellant, upon the sole basis of said determination, an enforcible and final legal duty to perform the requirement of the State Highway Commissioner, thus depriving appellant of primary or procedural due process of law and taking its property without primary due process of law."

V.

THE STATE STATUTE, THE CONSTITUTIONALITY OF WHICH IS ATTACKED.

The statute of the State of Virginia, challenged as unconstitutional under the 14th Amendment, is Chapter 62 of the Acts of the General Assembly of the State of Virginia, Session 1930, approved February 27, 1930, official volume Acts of Assembly, Virginia, 1930, pages 73 to 75, both inclusive. A complete copy of the statute is contained in the record below, pages 57 to 59, inclusive. Virginia Code Ann. (Michie, 1930), sec. 3974a.

In its provision pertinent to the question here raised, the statute provides:

> " * * * Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead * * * crossing becomes, *in the opinion of the State Highway Commissioner*, necessary for public safety and convenience, * * * *the State Highway Commissioner shall notify in writing* the railroad company * * * upon which the existing crossing at grade * * * is, * * * *stating particularly the point at which * * * the existing grade crossing is to be eliminated * * * and that the public safety or convenience requires* that the crossing be made * * * above * * * the tracks of said railroad, or that the existing grade

crossing should be eliminated or abolished, and a crossing constructed above * * * the tracks of said railroad, * * *, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein provided for leaves the ground line of the State road to go over * * * the tracks of the railroad, and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead * * * crossing* * * * in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on." (Italics added.)

There follow, in the statute, other pertinent provisions: (1) authorizing the railroad, if dissatisfied with the plans and specifications submitted by the State Highway Commissioner, to petition the State Corporation Commission, setting out its objections thereto and recommending plans and specifications in lieu thereof, and authorizing the Commission to hear the complaint, solely as to the plans and specifications, and to approve those submitted by the Highway Commissioner, or others in lieu thereof; (2) undertaking to make it the railroad's duty, in such event, to furnish materials and construct in accordance with the plans and specifications approved by the Corporation Commission; and (3) purporting to impose on the railroad one-half the total cost of the work done both by it within, and by the Highway Commissioner without, the right of way limits, and the obligation to maintain the portion within the right of way lines, except the surface of the roadway.

There is no provision for appeal by the railroad to the Corporation Commission or to any other forum for review

of the fundamental question whether public safety and convenience require the elimination of the grade crossing. There is no denial by appellee, there never has been denial by appellee, by the Corporation Commission, or by the Supreme Court of Appeals of Virginia, in any of the proceedings below, that the Highway Commissioner's *ex parte* determination of that question is final and is made final by the statute. And it is the determination of that question which results in the *taking vel non* of the railroad's property. The determination of the choice of the particular plans for the structure which the railroad is required to build, the only question of which the Corporation Commission is given review, affects not the *taking vel non* of the railroad's property but only the extent to which and the form in which it is taken.

VI.

PROCEEDINGS BELOW.

Acting solely upon the supposed authority of the said statute, the relator appellee, without giving notice to the appellant and without affording it a hearing or any opportunity to contest, pursuant to no semblance of due process of law in the primary or procedural sense, taking no evidence, but following only the steps set out in the statute and acting in the forum of his own mind, determined by personal and administrative fiat that in his opinion public safety and convenience required the elimination of an existing grade crossing of State Highway No. 12 with appellant's railroad near Antlers, Virginia, and the substitution in lieu thereof of an overhead highway crossing over the track and right of way of appellant. (R. 60, 64.)

Having made that determination, which we have already seen the statute undertakes to make final, without notice or hearing or procedure of any sort, he thereupon gave appellant notice in writing, dated January 7, 1931, that

he had formed that opinion and made that determination, with which notice he submitted to appellant plans and specifications for the work, and in which notice he called upon appellant to "proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted, within the right of way limits." (R. 61, 64.)

Appellant replied to that notice and requirement by letter dated January 20, 1931 (R. 62, 65), in which it said that it did not agree with the Highway Commissioner's opinion that the public safety and convenience required the said elimination construction, asserted the unconstitutionality of the statute, and advised that "unless and until it should be finally determined by the courts that it is a valid statute, this company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

The Highway Commissioner thereupon, without other intermediate handling, filed a complaint against appellant in the State Corporation Commission of Virginia, seeking an order of the Commission to compel appellant to perform the supposed "duty," asserted to have been imposed upon appellant by the foregoing acts of the Highway Commissioner under the Act of 1930. (R. 60-65, incl.)

The complaint alleged: that the Highway Commissioner, acting under the Act of 1930, had officially ascertained and determined that the elimination of the grade crossing and the substitution of the overhead crossing was necessary for public safety and convenience; that he had given this appellant notice of that determination and had submitted plans and specifications as required by the Act; that it thereupon became the legal duty of appellant to provide all equipment and materials and to construct the overhead accordingly; that he had called upon it to do so; that appellant had failed and refused to obey and perform said

duty, asserting that the statute was unconstitutional; that the cost of the work when done would be divided half and half between the commonwealth and appellant as provided in the Act; that the Corporation Commission had constitutional and statutory jurisdiction *to receive the complaint, to ascertain and determine whether appellant had failed or refused or was failing or refusing to comply with said duty, and to impose fines and otherwise enforce performance by it of said duty.* It prayed that appellant be required to perform said alleged duty.

Appellant demurred to said complaint, on the grounds, as specified and elaborated in the demurrer (R. 66-68), that the complaint did not state a cause of action in that the Act of 1930 was unconstitutional, null and void, as denying primary or procedural due process of law, in violation of the due process clauses of the 14th Amendment to the Constitution of the United States and of Article 1, Section 11, of the Constitution of Virginia, in the respects detailed in the demurrer and summarized in appellant's Jurisdictional Statement.

The federal constitutional question was thus squarely, explicitly, and in detail raised in the outset by the demurrer.

There was no issue of fact for the Corporation Commission. It had for decision only the squarely raised legal issue as to the constitutionality of the Act of 1930 and of the acts of the Highway Commissioner thereunder, and whether any constitutionally enforcible legal duty had been imposed thereby on appellant.

No question was raised by appellant of the substantive police power to make reasonable and not purely arbitrary requirements, in the interest of public safety and convenience, requiring uncompensated obedience by railroads by contributing their own property and work to construction of grade crossing elimination structures reasonably necessary to protect the public, *provided such requirements are made with due compliance with procedural due process of*

law. We deny the constitutional power to delegate to an administrative officer or board the power to make such a requirement, and to make it final, without notice, without hearing, without evidence, without any semblance of procedural due process, by administrative fiat based solely on his *ex parte* opinion, as the Act of 1930 undertakes to delegate the power to the Highway Commissioner.

The Corporation Commission took the constitutional question as properly raised on the complaint and demurrer and, after argument and reargument, and holding the case under advisement nearly a year, from March 30, 1931 (R. 69), to March 8, 1932, finally handed down an elaborate 98 page opinion (R. 71-170), in which, although admitting that it would be unconstitutional for a statute enacted under the taxing power, under the power to impose assessments for public improvements, and under other state powers, to deny notice and hearing and to delegate to an administrative officer or board such essentially arbitrary powers to act without procedural protection, yet held that the police power, particularly that aspect of it applied to grade elimination requirements, is so broad and untrammelled in scope as not to be subject to those procedural requirements of due process which the 14th Amendment imposes as to similar exercises of all other branches of the state's power.

It overruled the demurrer and, there being no issue of fact raised, ordered appellant to forthwith proceed to comply with the Highway Commissioner's requirement. However, it suspended its own order to allow appeal. (R. 69-70.)

On appeal, the Supreme Court of Appeals of Virginia treated the federal constitutional question as substantial, as properly raised, and decided the question in favor of the validity of the assailed statute, affirming the Corporation Commission by a divided court, Campbell, C. J., and Epes, J., dissenting (R. 174-192). The affirmed order has been stayed by supersedeas pending this appeal (R. 198-199).

VII.

ARGUMENT.

1.

There Can Be No Question that Appellant Has Pursued a Proper Remedy.

The federal constitutional question here raised was the same in part as that presented by the plaintiff in the recent case of *Investors' Syndicate v. Porter*, 52 F. (2d) 189, and there sustained by the District Court for the District of Montana, three judges sitting, and which holding this Court on appeal did not pass upon on the merits, 286 U. S. 461, 287 U. S. ——, 77 L. ed. (adv.) 166, because this Court held that the plaintiff, appellee, had not exhausted his administrative remedies before applying for injunctive relief in equity. As we read the opinions in that case, all the implications are that the plaintiff's constitutional question of primary due process under the 14th Amendment had merit (see 286 U. S. 469) but that he had sought the extraordinary relief of equity too soon.

No such situation exists here. Appellant here has not sought equitable relief to enjoin the acts and requirements of the state authorities. It has refused to comply with the requirement and the state officer has sought his administrative, quasi-judicial, or judicial remedy before the Corporation Commission to enforce compliance. There it was proper for appellant to, indeed it was its duty to, defend upon its constitutional defense. This it did. Its defense, properly raised, being determined against it, it followed the only course open to it, appeal to the Supreme Court of Appeals of the State. That court having determined the constitutional question against it, appellant's only course is to seek review here on appeal.

The suggestion is contained in appellee's statement opposing jurisdiction that since this case is on demurrer and since there is no evidence offered that the Highway Commissioner's requirement is in fact "arbitrary, oppressive, or confiscatory," no case is made of unconstitutionality under the 14th Amendment, and that "it is not necessary for notice and hearing to be accorded by the statute to prevent arbitrary, oppressive or confiscatory exercise of the power conferred by the statute upon the Highway Commissioner; because if the power is abused 'equity's long arm will stay his hand.'"

This overlooks the distinction between want of due process in the primary or procedural sense and want of due process in the substantive sense.* The assault here is not upon an order, entered under a valid statute, as being substantively unreasonable and so going beyond the substantive limitation on the police power of reasonableness. The assault is upon the constitutionality of the statute itself, and acts thereunder, in denying notice and hearing and the procedural protections which must be provided, and without which any final order or requirement by an administrative board or officer resulting in deprivation of property is necessarily arbitrary as matter of law.

If the suggestion means that appellant cannot complain of the unconstitutionality of the statute, as denying primary due process of law, in this legal proceeding upon demurrer, because, although procedural due process is denied by the statute and by the official acts thereunder, nevertheless the Highway Commissioner may peradventure have made a requirement which is reasonable in fact, regardless of his denial of notice and hearing and failure to follow any known legal procedure, and because if not so reasonable in fact appellant could go into equity to enjoin enforcement, then the suggestion answers itself. The

*See *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, for apt treatment of the distinction.

same answer would apply to every instance of a statute delegating arbitrary powers to an administrative official to act without notice and hearing, without the procedural protection included within the meaning of due process. None of the many decisions of this Court holding such statutes unconstitutional could have ever been so decided, if that suggestion be an answer, since the courts of equity are always open to redress wrongs, yet courts of law consistently determine such statutes to be unconstitutional as denying primary due process.

If the suggestion means that appellant could not properly litigate its constitutional question in a legal proceeding on demurrer because appellant may have another adequate remedy in equity, then it is an inversion of the rule. Equity withholds relief where there is an adequate remedy at law, but we have never before heard it suggested that law will withhold a legal remedy, or will refuse decision upon a properly raised constitutional question, because perchance there may be an equitable remedy.

But there was no equitable remedy here. When the Highway Commissioner made his requirement, if the appellant had then gone into equity to restrain enforcement on the same constitutional grounds here asserted, it would have been met with the inescapable answer that equity was without jurisdiction because appellant had an adequate remedy at law, to wit, to refuse to obey the requirement, await the bringing by the Highway Commissioner of a proceeding before the Corporation Commission to enforce the requirement, and there defend on its assertion of unconstitutionality.

2.

It is Clear from the Decisions that a Statute Such as Here Involved Would Be Void Under the 14th Amendment if Passed Under Any Branch of the State's Power Other Than the Police Power.

There can be no question that in the exercise of the power to tax a state cannot constitutionally delegate to an administrative board or officer the power to make a final assessment without notice or hearing, without right to contest pursuant to recognized modes of procedure. The law itself must require notice and hearing as matter of legal right and no notice and hearing in fact, as matter of grace or favor or discretion, will suffice. *Security Trust & Savings Co. v. Lexington*, 203 U. S. 323; *Central Ga. R. Co. v. Wright*, 207 U. S. 127; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144; *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Turner v Wade*, 254 U. S. 64.

The same is equally true of the power of the state to impose assessments for public improvements. The distinction is clearly drawn that, whereas the legislature may itself act without notice or hearing to the individual, all the people being represented and in theory heard in the legislature's own proceedings, yet when the legislature undertakes to delegate to an administrative board or officer the power to act in a particular instance the inquiry becomes, as this Court significantly said in *Parsons v. District of Columbia*, 170 U. S. 45, "in its nature judicial in such sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard." To the same effect, *Embree v. Kansas City & L. B. District*, 240 U. S. 242; *Withnell v. Ruecking Construction Co.*, 249 U. S. 62; *Browning v. Hooper*, 269 U. S. 396; *Stuart v. Palmer*, 74 N. Y. 183.

The legislature cannot constitutionally delegate its essentially legislative and sovereign power to impose regulations resulting in uncompensated obedience and taking of

property without notice and hearing and without those procedural protections thrown around the citizen by the 14th Amendment. *Eubank v. Richmond,* 226 U. S. 137; *Browning v. Hooper,* 269 U. S. 396; *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116.

Heretofore the Supreme Court of Appeals of Virginia has consistently recognized these procedural requirements of the due process clause. *Violett v. Alexandria,* 92 Va. 561; *Thompson v. Smith,* 155 Va. 367.

In *Violett v. Alexandria, supra,* the Virginia court said:

> "It is not enough that the owners of the property affected by a local assessment may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice. Stuart v. Palmer, 74 N. Y. 188."

That is almost verbatim the language of this Court in *Coe v. Armour Fertilizer Works,* 237 U. S. 413.

In *Thompson v. Smith,* 155 Va. 367, the Virginia court held unconstitutional an ordinance of Lynchburg which, after providing for issuance of licenses to drive motor vehicles to persons passing examination, undertook to delegate to the Chief of Police power to revoke the license of "any driver who, in his opinion, becomes unfit to drive an automobile on the streets." That court there said:

> "It is a fundamental principle of our system of government that the rights of men are to be determined by

> the law itself, and not by the let or leave of administrative officers or bureaus. The principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether state or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

Other cases illustrating and expounding the limitation imposed by the due process clause of the 14th Amendment, forbidding the delegation by the legislature to administrative boards or officers of its own sovereign and essentially legislative power to act without notice and hearing, to make law, are: *Yick Wo v. Hopkins*, 118 U. S. 356; *Tracy v. Ginzberg*, 205 U. S. 170; *Wagner v. Leser*, 239 U. S. 207; *United States v. Colgate Grocery Co.*, 255 U. S. 81; *Truax v. Corrigan*, 257 U. S. 312; *Wichita R. R. & L. Co. v. Public Utilities Commission*, 260 U. S. 48; *Adkins v. Children's Hospital*, 261 U. S. 525; *Small Co. v. Sugar Refining Co.*, 267 U. S. 233; *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Marx v. Maybury*, (D. C., Wash., 1929) 36 F. (2d) 397.

This Court clearly defined the limitation upon the delegation to administrative officers or boards of legislative powers in *Wichita R. R. & L. Co. v. Public Utilities Commission*, 260 U. S. 48, 59, where it was said:

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, *must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.* It is a wholesome and necessary principle that such an agency *must pursue the procedure and rules enjoined*, and show a substantial compliance therewith, to give validity to its action." (Italics added.)

The substantive due process limitation of reasonableness, where power is delegated to administrative boards or officers, would amount only to idle verbiage without the adjective due process requirement of notice, hearing, and enjoined forms of procedure.

Yet in the Act of 1930 the State of Virginia undertakes to delegate to an individual administrative officer the power to deprive a railroad of its property, to select which railroad shall be so deprived, to select which grade crossings it shall be required to eliminate, upon a finding of public safety and convenience, without notice, without hearing, without evidence, and without enjoining upon him any semblance of procedure whatsoever, but expressly authorizing him to make the controlling determination upon the sole basis of his arbitrary, *ex parte,* purely personal opinion. No clearer example of an attempt to authorize taking of property by arbitrary administrative fiat could, we think, be found.

Under the similar limitation of the 5th Amendment Congress has no power, under its broad authority to regulate interstate commerce, to empower the Interstate Commerce Commission to make a final determination without notice, without hearing, without evidence or without sufficient evidence, by administrative fiat. *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S. 88. This Court there said:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to 'the indisputable character of the evidence.'"

That case is, we submit, the complete answer to the argument of appellee that the Virginia Act is constitutional because, although it authorizes appellee to act without notice, without hearing, by fiat, without following any semblance of enjoined procedure, and although he so acted, yet for all that appears of record he may in the particular instance involved have acted beneficially and reasonably in fact. In law his acts were purely arbitrary, and under a statute expressly undertaking to authorize purely arbitrary action.

We think it is a misreading of this Court's decisions to draw from them the conclusion that the state's police power is any freer from the procedural limitations of the due process clause of the 14th Amendment than is the Congress's power to regulate commerce from the similar limitations of the 5th Amendment.

3.

Neither the Fact that the Statute Involved Was Passed as an Exercise of the State's Police Power nor the Fact that it Was Passed as an Exercise of the Particular Branch of the Police Power Under Which the State Has Substantive Power to Require Grade Crossing Eliminations at the Expense of Railroads Makes it Valid, Since it Denies All the Procedural Protection of Due Process in the Primary Sense.

Running throughout this case, in the opinion of the Corporation Commission, in the majority opinion of the Court of Appeals of Virginia, and in the Jurisdictional Statement and Motion to Dismiss or Affirm of Appellee, there is the

admission that a statute such as the Act of 1930 would be unconstitutional as denying primary due process, if passed in the exercise of the state's taxing power, its power to assess benefits, any other of its powers, in fact, *except the police power*, but the position is that the police power, and especially that aspect thereof under which the state may require railroads to eliminate grade crossings at their own expense in whole or in part, is so broad and untrammelled as to be *sui generis*, and that under such power the state may competently delegate to an administrative officer the power to make a final regulation and requirement, without notice, without hearing, without evidence, without following any prescribed procedure. It is said that because this is done under the police power it is not a "taking" of property but is the mere making of an "administrative regulation."

See the discussion by the Corporation Commission (R. 119-129) admitting the procedural requirements of notice and hearing and forms of procedure as declared in the cases arising under the power to tax and under the power to assess benefits, etc., but concluding with this significant statement (R. 128-129):

> "The defendant, in referring to *New York, etc., Railway Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Chicago, etc., Railway Co. v. Nebraska*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481; and *Erie Railway Co. v. Public Utilities Commissioners*, 254 U. S. 394, 65 L. Ed. 322, points out that the statutes in such cases provided for notice to or an opportunity to be heard by the railroad company before it should be required to eliminate grade crossings. It is true that the statutes involved in such cases did require such notice, and the courts in considering such questions and the contention that the statutes deprived the defendant of property without due process of law, referred to the fact that the statutes did provide for notice or an opportunity to be heard, but the fact that they did so is not to be taken as holding that notice to or an opportunity to be heard was essential to due process of law.

"While nearly all of the statutes involving the alteration or abolition of grade crossings, whenever in the opinion of the administrative body the public safety or convenience requires such alteration or abolition, provide for a hearing, yet there is no case which holds that notice of a hearing and an opportunity to be heard are absolutely necessary.

"When the General Assembly conferred upon the State Highway Commissioner—who is an arm of the State—the function to require the elimination of an existing grade crossing and the substitution therefor of an overhead or underpass crossing, whenever such elimination and substitution in his opinion becomes necessary for the public safety or convenience, it had authority to prescribe the course to be pursued, and if it had required notice to be given to the railroad company, the State Highway Commissioner would have to comply with such requirement, but it has not so required, and it was not essential that it do so."

The same admission and the same attempted distinction run throughout the opinion of the Court of Appeals (R. 174-192) and it said succinctly on R. p. 189:

"Was notice to the railway company necessary before the commissioner undertook to ascertain the character of the crossing? It was not unless property in some proper sense was to be taken."

Hence the whole opinion of that court is grounded upon the postulate that no *taking* of property "in the proper sense" is involved. If a taking be involved the statute is admittedly invalid under the 14th amendment.

After admitting that such a statute would be invalid if passed under the state's tax power, its rate making power, its power to assess for benefits for public improvement, its power to require railroads to extend and build tracks, its power to regulate ordinary business (the business of a railroad being apparently deemed a species of *caput lupinum*) and after attempting to distinguish cases relied on by appellant from a case under the police power to regulate

railroads at grade crossings (Appellee's Jurisdictional Statement, heading "Appellant's Cases Differentiated"), appellee says, "No one would question that both notice and opportunity to be heard are required in this class of cases."

It is true that in the earlier decisions by this Court following the adoption of the Civil War Amendments there were broad statements indicating that the police power of the states was in no wise restrained or limited by the 14th Amendment. These statements started with *Barbier v. Connolly*, 113 U. S. 27, 31, and are repeated in *Mugler v. Kansas*, 123 U. S. 623; *Coppage v Kansas*, 236 U. S. 1; *Lochner v. New York*, 198 U. S. 45, and in a host of other cases.

Characteristic is the statement quoted by appellee from *New Orleans Public Service Co. v. New Orleans*, 281 U. S. 682, that:

> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exercise of the police power is not a taking of property without due process of law."

The first observation as to those broad statements is that they deal with the substantive power of the state, not with the procedural limitations of the 14th Amendment.

The next is that the very use of the word "legitimate" implies that while the state has the substantive power it can only exercise it "legitimately." It is not a "legitimate exertion of the police power" for the legislature to delegate its exercise to an administrative officer without enjoining notice, hearing, and due procedural steps.

But the old idea, here revived by appellee, that the police power of the state is wholly unrestrained by the 14th Amendment, and based upon general language in early cases, is now in the limbo of forgotten ideas. In *Adkins v. Children's Hospital*, 261 U. S. 525, quoting from *Lochner v. New York*, 198 U. S. 45, this Court said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be."

The leading case of *Yick Wo v. Hopkins,* 118 U. S. 356, itself dealt with an exercise of the state's police power, and this Court there said, of a delegation of an arbitrary personal power to administrative officers indistinguishable in essential character from the power conferred on the Highway Commissioner by the Virginia Act of 1930:

> "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

That and similar cases are attempted to be distinguished by appellee on the ground that they dealt with the police power to regulate "ordinary businesses" whereas the Virginia statute applies to the business of a railroad. That even a railroad's property is not *caput lupinum* is clear. *Chi., M. & St. P. R. Co. v. Tompkins,* 176 U. S. 167, wherein this Court said:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protection clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated."

We have seen that the whole predicate of the decision below is that this statute is not in conflict with the 14th Amendment because no "taking" of the railroad's property is involved in the requiring of uncompensated obedience to an order to build an elimination structure to separate grades of a railroad-highway crossing. As authority for this predicate there are cited the many cases dealing with the substantive validity of grade crossing elimination requirements. *New York, etc., R. Co. v. Bristol,* 151 U. S. 556; *Chi., B. & Q. R. Co. v. Nebraska,* 170 U. S. 57; *Northern Pac. R. Co. v. Duluth,* 208 U. S. 583; *St. Paul, etc., R. Co. v. Minnesota,* 214 U. S. 497; *C. I. & W. R. Co. v. Connersville,* 218 U. S. 336; *Chi., etc. R. Co. v. Minneapolis,* 232 U. S. 430; *Great Northern R. Co. v. Clara City,* 246 U. S. 434; *Erie R. R. Co. v. Public Utilities Commissioners,* 254 U. S. 394; *Southern R. Co. v. Durham,* 266 U. S. 178; *Lehigh Valley R. Co. v. Board of Commissioners,* 278 U. S. 24; *New Orleans Public Service Co. v. New Orleans,* 281 U. S. 682.

Those cases held only that it was within the substantive power of the states to make such requirements. None of them has held that it is competent for the state to delegate that power to an administrative board or officer, without requiring notice and hearing and without enjoining a necessary and appropriate procedure to comply with primary due process of law. A careful examination of those cases will show that in every instance involving statutory delegation to a board or officer the statute made most careful and full provision for notice, hearing, and review on the merits, and that in every instance such provisions were fully complied with.

The *Bristol case* involved a statute which made detailed provisions for notice and hearing before the board made its requirement, and for full review on the merits thereafter. It complied with every element of procedural due process which the Virginia statute lacks. The same is true of the *Erie case,* the *Lehigh Valley case,* and all the

others wherein the delegation of power to act was to an administrative board or officer. In the famous *Erie case* (see the report thereof in 89 N. J. L. 57, 98 Atl. 13, 28; and in 90 N. J. L. 672, 673, 677, 694, 714, 729, 103 Atl. 1051-1053, 1055) not only did the statute provide for notice, hearing, and full review on the merits, but the requirement was imposed only after petition, notice, answer, and 18 hearings before the board lasting over two years, then there was a full rehearing before the board, and full review on the merits by the Supreme Court and by the Court of Errors and Appeals.

There was no suggestion of lack of due process in the primary or procedural sense in that case. And when this Court said therein, in the picturesque phrase of Mr. Justice Holmes, "That the states might be so foolish as to kill the goose that lays golden eggs for them has no bearing on their constitutional rights," it seems clear that it was speaking only of the substantive scope of the power, and that it did not mean to intimate that the state may delegate to a board or officer the power to "kill the goose" without notice or hearing, without evidence, without any form of procedure, but merely by final administrative fiat based solely on *ex parte* opinion.

The *Lehigh Valley case, supra,* contains a very strong declaration that even the substantive power is not without strict constitutional limitations of reasonableness and it contains no intimation whatsoever that the power is exempt from the well understood procedural limitations of the 14th Amendment. *A fortiori* there must be due process in the procedural sense.

The cases involving validity of municipal ordinances, laws enacted by the municipal branch of the legislature, such as *Chicago, etc., R. Co. v. Nebraska,* 170 U. S. 57, *Southern R. Co. v. Durham,* 266 U. S. 178, and *New Orleans Public Service Co. v. New Orleans,* 281 U. S. 682, are in no way pertinent to the question raised on this appeal, very different principles there applying.

And yet appellee asserts in his Statement Opposing Jurisdiction that those grade crossing elimination cases have expressly held that no notice or hearing is required by the 14th Amendment to be provided for in a statute delegating the grade crossing elimination power to administrative boards or officers. He says:

> "In the earlier cases it was vigorously asserted by the railroads that notice and a hearing was required and had been denied them but it was expressly held that no notice or hearing was required. The point has not been urged in the later cases. It was embalmed in the earlier cases and should not be revived."

If that be true, it is important that this Court make it clear that the 14th Amendment does not impose upon the police power to require eliminations of grade crossings any of the well settled procedural guaranties which it throws around the citizen to protect against purely arbitrary exercises of other phases of the state's power. This would, we think, be news to the profession.

Certainly the legislatures of the states have not understood that it was competent for them to delegate to administrative boards or officers the power to make final grade crossing elimination requirements without notice, without hearing, without evidence or procedure of any kind, based on arbitrary opinion, by administrative fiat. The statutes have quite uniformly made careful and complete provisions enjoining notice, hearing, and orderly procedure and full review on the merits.*

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*Statutes have been found in 43 states delegating to administrative boards, commissioners, or officers the power to enter orders requiring grade crossing elimination structures to be built by railroads at their own expense in whole or in part.

Of these, 31 clearly and expressly provide for and require notice and hearing prior to the entry of the order. *Arkansas Dig. Stat. (Crawford & Moses, 1921), sec. 1644; California Gen. Laws (Deering, 1931), Act 6386, sec. 43 (b); Colorado Comp. Laws 1921, sec. 2940; Connecticut Gen. Stat. 1930, sec. 3670; Delaware Laws 1917, ch. 63, sec. 6, at p. 177; Idaho Code Ann. (1932), sec. 60-304; Illinois Rev. Stat. (Smith-Hurd, 1929), c. 111 2/3, sec. 62; Indiana Ann. Stat. (Burns, 1926), sec. 12841; Iowa Code (1931), secs. 8020, et seq.;*

The General Assembly of Virginia has fully complied with these procedural requirements in the statutes conferring power on the Corporation Commission to regulate railroads in all other respects. Code 1930, sections 3711, 3720, 3726, carefully guard due process procedural requirements by providing in detail for notice and hearing before that Commission may act. Section 3723 requires it to administer the common and statute law of evidence in like manner as courts. And section 3734 grants appeal and full judicial review as matter of right as to every order entered.

Kentucky Stat. (*Carroll, 1930*), *sec. 4356Z-2; Maine Rev. Stat.* (*1930*), *ch. 27, sec. 39, pp. 516, 517; Maryland Code Ann.* (*Bagby, 1924*), *art. 23, sec. 240, id.* (*Bagby, Supp. 1929*), *art. 91, secs. 38 A to 38 G; Massachusetts Gen. Laws* (*1932*), *ch. 159, sec. 65, et seq.; Michigan Comp. Laws* (*1929*), *sec. 3943, at p. 1576; Minnesota Stat.* (*Mason, 1927*), *sec. 4742; Nebraska Comp. Stat.* (*1929*), *sec. 75-517, 75-518; Nevada Comp. Laws* (*Hillyer, 1929*), *sec. 6118, sec. 6125; New Jersey Comp. Stat.* (*Supp. 1931*), *sec. 167-30, New Jersey Comp. Stat.* (*Supp. 1925-1930*), *sec. 167-34; New Mexico Stat. Ann.* (*Courtright, 1929*), *sec. 116-1203; New York Railroad Law* (*as amended 1928*), *sec. 91; Ohio Gen. Code Ann.* (*Throckmorton, 1926*), *sec. 6956-24; Oklahoma Stat.* (*Harlow, 1931*), *secs. 3660, 3661; Oregon Code Ann.* (*1930*), *sec. 62-704; Pennsylvania Stat. Ann.* (*Purdon, 1930*), *Tit. 66, sec. 571; Rhode Island Gen. Laws* (*1923*), *ch. 251, sec. 39; South Dakota Comp. Laws* (*1929*), *sec. 9646-A; Utah Comp. Laws* (*1917*), *secs. 4811, 4827; Vermont Laws 1923, No. 95, p. 101; Washington Code Ann.* (*Pierce, 1929*), *sec. 5641; Wisconsin Stat.* (*1931*), *secs. 84.05, 195.29, 195.30; Wyoming Rev. Stat. Ann.* (*1931*), *secs. 94-140, 94-142.*

Five states, Alabama, Florida, Louisiana, Montana, and Texas, appear to have no such statutes.

The statutes of eight states, Arizona, Georgia, Mississippi, Missouri, New Hampshire, North Carolina, South Carolina, and West Virginia, may be said to be in a kind of "twilight zone" *quoad* requirement for notice and hearing. They do not expressly require notice and hearing before the commission or board makes its order, but they guarantee full review on the merits, not a mere review limited to objections to particular plans, as in the Virginia statute. Hence there must be notice and hearing before the requirement becomes *final* on the merits. *Arizona Rev. Code* (*1928*), *sec. 700; Georgia Code Ann.* (*Michie, Supp. 1930*), *secs. 2677* (*16*), *2677* (*18*), *2677* (*26*); *Mississippi Code Ann.* (*1930*), *sec. 5007; Missouri Stat. Ann., secs. 5177, 5233; New Hampshire Public Laws* (*1926*), *ch. 249, secs. 9, 11; North Carolina Code Ann.* (*Michie, 1931*), *secs. 1041, 1048, 1097; South Carolina Civ. Code* (*1932*), *secs. 8437, 8438, 8444, 8445; West Virginia Code Ann.* (*Michie, 1932*), *secs. 1569, 1570, 1571, 1572.*

In only four of the states, Kansas, North Dakota, Tennessee, and Virginia, do the statutes clearly fail to require notice and hearing before the order becomes final. *Kansas Rev. Stat.* (*Supp. 1931*), *sec. 68-414; North Dakota Comp. Laws Ann.* (*Supp. 1925*), *sec. 4688a 11; Tennessee Code* (*1932*), *sec. 2638; Virginia Code Ann.* (*Michie, 1930*), *sec. 3974a.* And in none of those states, except in the instant case in Virginia, have we found the question raised.

It could only have been by an oversight that the Virginia legislature entirely failed to make any such provisions in delegating power to the Highway Commissioner by the Act of 1930 here in question.

In the recent case of *Norwegian Nitrogen Products Co. v. United States*, decided Feb. 6, 1933, this Court clearly distinguished between what is required in procedure in a statutory hearing by the Tariff Commission, which only advises and recommends to the executive, and the traditional procedural requirements of notice and full hearing, action only upon competent and sufficient evidence, etc., applicable to the action of delegated boards and officers such as the Interstate Commerce Commission, the state commissions regulating carriers and utilities, etc. It said:

> "Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain, is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. • • • It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce charges to the point of confiscation. Smyth v. Ames, 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. Interstate Commerce Commission v. Union Pac. R. R. Co., 222 U. S. 541; Manufacturers Ry. Co. v. United States, 246 U. S. 457; Nor. Pac. v. Dep't Public Works, 268 U. S. 39, 44; Chi. & P. Ry. Co. v. Public Utilities Comm., 244 U. S. 344, 351. Cf. Sharfman, The Interstate Commerce Commission, Vol. II, p. 424. *The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow, to the attack and review to*

which their orders will be subject. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93; St. Louis Ry. Co. v. Interstate Commerce Commission, 264 U. S. 64; Atchison, T. & S. F. R. Co. v. United States, 264 U. S. 248. *The Commerce Act, as it stands today, and kindred statutes in the States, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision.*" (Italics added.)

We submit that that language could not have been written by a court which has declared and maintains the law to be that it is competent for the legislature of a state to delegate to an individual administrative officer or to a board such a power as the Act of 1930 undertakes to confer on the Virginia Highway Commissioner.

His action under that statute is not advisory or recommendatory; it ordains. It impinges upon appellant in exactly the same way as an order of the Interstate Commerce Commission requiring automatic fire doors or fixing rates or an order of a state commission requiring train connections or the building of an industrial track. The Highway Commissioner's *ex parte* fiat imposes upon appellant, by the terms of the statute, a ripened and mandatorily enforcible requirement to spend its money, do construction work, and devote to public purposes part of its property.

Yet no reviewing court could possibly determine what elements entered into the formulation of his "opinion" as to public safety and convenience or what considerations, if any, determined or influenced his fiat.

While the requiring of a railroad of uncompensated obedience to an order for the elimination at its own expense of a dangerous grade crossing is not a "taking" of property without due process of law in the substantive sense, if the order be substantively reasonable and if it be entered as a "legitimate" exercise of the police power under a

valid statute giving the procedural due process protection required by the primary sense of the due process clause of the 14th Amendment, we submit that it is idle to say, as appellee says and as the court below said, that there is involved in the instant case no "taking" of property *qua taking* but only an "administrative regulation." *Chi., M. & St. P. R. Co. v. Minnesota,* 134 U. S. 416; *Missouri P. R. Co. v. Nebraska,* 217 U. S. 196; *Washington, ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510; *Great Northern Ry. Co. v. Minnesota,* 238 U. S. 340; *Chi., M. & St. P. R. Co. v. Board of Railroad Commissioners,* 76 Mont. 305, 247 Pac. 162.

We submit that the case of *Chi., M. & St. P. R. Co. v. Minnesota,* 134 U. S. 416, is squarely in point to the question here raised. There a police power statute of Minnesota, quite comparable to the Virginia statute here assailed, undertook to delegate to the railroad commission of that state the power to regulate and fix rates and charges without notice and hearing, by administrative fiat, and to make the rates so fixed final and subject to no judicial review on the merits. No provision of that statute enjoined notice and hearing or required the commission to take or consider evidence or to follow any required procedure. It undertook to authorize the commission, on its own *ex parte* consideration, merely to publish the rates, just as the Virginia statute undertakes to authorize the Highway Commissioner, merely on his *ex parte* opinion, to determine that the public safety and convenience require that the railroad build an overhead crossing or underpass. And it undertook to make those rates final, just as the Virginia statute undertakes to make final the Highway Commissioner's finding of public safety and convenience. The cases are indistinguishable in principle. Appellee seeks to distinguish them on the ground that one involved the rate regulation aspect of the police power while the other involves the grade crossing elimination aspect of that power, which is, we submit,

no distinction at all. The one aspect must be as subject as the other to the procedural requirements of due process.

The question of constitutionality arose procedurally there as it does here. After the commission made its *ex parte* rates and the carrier refused to put them in force, the commission brought mandamus to compel performance, and the carrier defended on unconstitutionality. The state court held, just as it is here held, that there was no fact to traverse except the asserted violation of law in refusing to put in effect the commission-made rates. In the course of an elaborate discussion of the constitutional question, this Court said:

> "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, *in fact, nothing which has the semblance of due process of law;* and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by agent, and the commission investigated the rates charged by the company, for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at." (Italics added.)

Just so, in our case, the Act of 1930 provides for "nothing which has the semblance of due process of law."

In every rate case since the *Minnesota case* and since *Smyth v. Ames,* 169 U. S. 466, in which the question of procedural due process has been raised the same law has been declared.

In *Missouri P. R. Co. v. Nebraska, supra,* this Court held violative of the 14th Amendment a statute of Nebraska which undertook to require railroads, at their own expense, and without any provision for notice and hearing, to construct side tracks to any grain elevator, of not less than 15,000 bushels capacity, which might demand such track. It was sought to sustain the statute as a valid exercise of

the police power. This Court treated it as being a police power statute, but said:

> "It is also true that the states have the power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads, after all, are property protected by the Constitution and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for *taking* such property away. * * *
>
> "If the statute makes the demand (of the elevator company) conclusive, it plainly cannot be upheld. *If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act.*" (Italics added.)

And cf. the later case of *Chicago & N. W. R. Co. v. Ochs*, 249 U. S. 416, sustaining as a valid exercise of the police power an order of the Minnesota Commission, requiring a railroad to extend a side track to an industry, entered under a statute which fully complied with procedural due process requirements by providing for and guaranteeing notice and full hearing before the order was entered and full judicial review of the merits thereof thereafter. Distinguishing that statute from the one involved in the *Nebraska case*, this Court said:

> "The case of Missouri P. R. Co. v. Nebraska, 217 U. S. 196, * * * on which the railroad company relies, is plainly distinguishable. The (Nebraska) statute *made no provision for a preliminary hearing before an administrative body* and yet subjected the company to the risk of a fine of at least $500 if it awaited a hearing in court on the reasonableness of the demand. *Here there was provision for a full hearing before the Commission and also in the district court of the county.*" (Italics added.)

To the suggestion by appellee and the express holdings by the Commission and the court below, that no *taking* of property "in the proper sense" is here involved, the case of *Washington, ex rel. R. & N. Co. v. Fairchild*, 224 U. S. 510, would seem to be the conclusive answer. There this Court held that a delegated power, of exactly the same character as that undertaken to be delegated to the Highway Commissioner by the Virginia statute, was *not a power to make a mere administrative regulation but was a power to take railroad property.*

That again was a police power case. A statute of Washington undertook to authorize the railroad commission "after hearing to order that additional trackage or sidings be constructed and that additional connections be made." The statute contained full provision for notice and hearing before making of an order. It then expressly provided for proceedings in review in the superior court to "have such order reviewed and its reasonableness and lawfulness inquired into and determined." It contained, therefore, all those provisions which are utterly lacking in the Virginia statute. But it limited the reviewing court to a consideration of the evidence introduced before the Commission, rather than requiring trial *de novo*. After a full hearing before the Commission and after review in the state court, not *de novo*, but confined to the evidence before the Commission, the case came here for review of an order entered under the statute.

It was held that the statute complied with the procedural requirements of due process, that the review in the court was sufficient judicial review on the merits, although confined to the evidence taken before the Commission, since the carrier had full opportunity to offer all available evidence there, but on the merits this Court held the order invalid under the 14th Amendment as not supported substantively by sufficient evidence. While recognizing all the procedural requirements of due process which we here contend for,

the Court went further there and applied the substantive guaranty.

The first contention made in support of the order was the same which appellee here makes, *that no taking of property was involved, only an administrative regulation,* and that therefore no notice and hearing were necessary under the 14th Amendment. This Court answered that contention as follows:

> "The Commission's order requiring the Oregon Company to make connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid."

Similarly here, the *ex parte* requirement of the Highway Commissioner, entered under the supposed authority of the Act of 1930, would compel appellant to expend money and would prevent it from using for other purposes the land on which the bridge is to be built. *It cannot be deemed a mere administrative regulation. It is a taking of property.* No sound distinction can be made between a police power order requiring building a track connection and a police power order requiring building a highway overpass.

That a *taking* is here involved is plain also from the holding by this Court in *Great Northern Ry. Co. v. Minnesota,* 238 U. S. 340, wherein it was expressly held that an order of a state railroad commission requiring a railroad company to install and maintain scales at certain of its stations was a taking of property within the meaning of the 14th Amendment. It was said (p. 345):

> "Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances."

Yet the whole theory of appellee and of the court below is that notice and hearing and traditional required procedure need not be provided for by the Virginia Act of 1930, under the 14th Amendment, because no taking of property is here involved, but only a mere administrative regulation.

For a very interesting state court decision exactly in point see *Chi., M. & St. P. R. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162, wherein the Montana court held violative of the procedural due process requirements of the 14th Amendment an entirely analogous statute undertaking to confer on the railroad commission power, without any provision for notice, hearing, or any sort of enjoined procedure, to order railroads to build industrial spurs. In a learned and careful opinion that court held that statute unconstitutional, upon the authority of many of the cases cited in this brief. We think this Court's attention was invited to that interesting and sound decision in the briefs in *Porter v. Investor's Syndicate*, 286 U. S. 461, 287 U. S. ——, 77 L. ed. (adv.) 166.

4.

Cases Relied on by Appellee Distinguished.

We have already seen that the grade crossing elimination cases relied on by appellee involved substantive, not procedural, due process, and that the decisions, in their expression, entirely support, rather than refute, our contention that such a statute, when delegating power to administrative boards and officers, must require notice and hearing and must enjoin sufficient forms of procedure, and that the administrative order must be subject to full judicial review on the merits.

The court below (R. 189) placed considerable reliance upon cases like *Goddard, Petitioner, etc.*, 16 Pick. 504, 28 Am. Dec. 259; *Lemon v. Rumsey*, 108 W. Va. 242, 150 S. E. 725; involving necessary emergency exercises of the police

power, such as to abate infections or vegetable diseases. They manifestly have no application here.

The greatest reliance is placed by appellee on *Health Department v. Trinity Church*, 145 N. Y. 32, and on the dicta in *Chi., B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, approving what was really but a dictum in the *Trinity Church case*. This is but an interesting illustration of the dangerous self-perpetuating tendency of dicta.

The statute involved in the *Trinity Church case* provided that all tenements in the City of New York less than twenty years old should forthwith be supplied with "Croton or other water," and that tenements over that age should be so supplied on or before January 1, 1889. In addition, it authorized the department of health to compel the owners of old tenements to install water facilities prior to the date when the act itself should become effective as to them, to wit, January 1, 1889.

Trinity Church owned certain old tenements built more than twenty years before the Act, which had no water supply. It was not required by the health department to install the water supply in obedience to the statute at any time prior to January 1, 1889, the final date at which the statute required all tenements, regardless of age, to be so provided. That final date passed, the statute become universally applicable to all tenements, with no discretion left in the health department to longer excuse compliance. And still Trinity Church had not obeyed the statute. Two years and nearly three months after the deadline of the statute made it applicable to all tenements, and, to wit, on March 30, 1891, the health department served a notice on Trinity Church requiring it within five days to obey the now universal obligation of the statute. The church refused to comply with the notice and contested in court the right to require it to install water supply at its own expense. Of course, the statute was held to be a reasonable police regulation, universally applicable to tenements, and valid.

The defendant, apparently as a mere make-weight, in addition to its principal contentions of want of power, did throw in a half-hearted contention that the notice of the health department denied procedural due process in that it did not provide for hearing. This contention was wholly without merit. The time during which the health department had any discretion to excuse or postpone compliance with the statute had long since passed. At the time of the notice all tenement owners were under the duty, imposed finally by the statute itself, to furnish the water supply. The notice by the health department imposed no duty on the defendant. It merely called its attention to the fact that it was violating the duty finally imposed by the statute and called on it to obey the law.

It is true that Judge Peckham, who wrote the opinion, went on to say, in language which is quoted and emphasized by appellee, that the requirement would have been valid, even though imposed directly by the health department without notice or hearing. But this language was pure dictum, because it was inapplicable to the situation then before the court, the requirement under attack by the church having been imposed directly by the legislature itself. In the language of Mr. Justice Curtis, speaking for the court, in *Carroll v. Carroll*, 16 Howard 275, 287, 14 L. ed. 936, the *Trinity case* affords "an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."

Appellee attaches particular weight to the *Trinity case*, because a portion of the opinion therein was quoted with apparent approval by this Court in *Chi., B. & Q. R. Co. v. Nebraska*, 170 U. S. 57. That case involved the validity of a *city ordinance*—a legislative act—which required the railroad company to rebuild a grade separation structure. What is said by the Court in that case, therefore, must be taken to relate to the *facts then in issue*, to the validity of a *legislative enactment*, and not to an order of a subordinate

official attempting to take private property by administrative fiat, without notice to the property owner, without hearing as to the propriety or reasonableness of the taking, and without opportunity for judicial review. The most that can be said for the quotation that this Court made from the *Trinity case* is that it was a dictum by this Court, following a dictum of the New York court; in short, a dictum fashioned from a dictum. It may be said here, therefore, as was said in *Ex Parte Bakelite Corp.*, 279 U. S. 438, 455, 73 L. ed. 789, that:

> "This statement was purely an *obiter dictum*, because the question * * * was in no way involved. And any weight the dictum, as such, might have is more than overcome by what has been said on the question in other cases where there was need for considering it."

Another case cited and discussed in the opinion below, and relied on by appellee in his motion, is *Breiholz v. Board of Supervisors*, 257 U. S. 118, in which this Court had under review an Iowa statute which authorized a county board of supervisors to establish drainage districts, adopt systems of drainage, and to assess the lands benefited for the costs thereof. The statute made "elaborate provision" for notice to owners of lands to be affected by the creation of a proposed district, and for a hearing thereon. A district was created in the manner prescribed by the statute, after full notice and hearing. Thereafter, in pursuance of statutory authority, the board made necessary repairs to the drainage system, and assessed the cost thereof upon the lands in the same proportion that the original cost was apportioned. It was held that notice and hearing were not necessary before such repairs were undertaken. This simply means that government authorities have the power to make repairs to government property without according notice and hearing to taxpayers, even though such repairs may occasion additional taxes. It is difficult to see how this decision

affords any support to appellee's argument that a state official may consistently with due process of law compel a corporation to expend its money for a public work, without giving the corporation notice of the proposed taking and an opportunity to be heard on the question. Indeed, in that case the Court acknowledged that notice and hearing would be necessary before a *new* project could be undertaken, saying:

> "It is not necessary that we should consider whether a case can be imagined in which the ditches of a district might be enlarged, deepened, widened and lengthened to an extent such as to constitute a new construction and a *new taking of property, which would require a further notice and hearing before a new assessment for it could be constitutionally imposed*, for we have no such case here." (Italics added.)

Appellee relies, as did the court below, on *Morris v. Duby*, 274 U. S. 135, where this Court upheld an Oregon statute which authorized the State Highway Commission to fix maximum weights and speeds for vehicles moving over or upon the highways of the State, whenever necessary to protect the highways from undue damage. That case, as we read it, only involved the substantive validity of the regulation, no question of procedural due process being raised or discussed in the opinion. And there is a manifest distinction between a statute authorizing a highway commission to make unformly applicable regulations as to weight and speed of vehicles on the state's highways and a statute undertaking to empower a highway commissioner to pick out a particular railroad and make a grade elimination requirement applicable to it alone, as to a particular crossing, and not applicable to all railroads similarly situated.

Finally, appellee cites the language of this Court in *Missouri, etc., R. Co. v. May*, 194 U. S. 267, where it was said:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the

joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Against that statement we quote the countervailing and interlocking principle enounced in *Yick Wo v. Hopkins*, 118 U. S. 356, and often reaffirmed:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude *that they do not mean to leave room for the play of purely personal and arbitrary power.*" (Italics added.)

And while the legislatures are the ultimate guardians of liberties and welfare of the people equally with the courts, it is not competent for a legislature to make an administrative official such "ultimate guardian" by putting in his hands such purely personal and arbitrary power as Virginia has undertaken to delegate to its Highway Commissioner. There is no room in the joints of the machine for the play of such purely personal and arbitrary power.

We submit that the federal constitutional question raised is not only substantial but is entirely well taken; that this Court has jurisdiction; that the Motion to Dismiss or Affirm should be denied; and that the decision below should be reversed on the merits.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 26

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA, APPELLEE.

BRIEF FOR APPELLEE.

The opinions below afford excellent briefs for appellee, the one by the Supreme Court of Appeals of Virginia being clear and succinct, the one by the *nisi prius* court (the Virginia State Corporation Commission), elaborate and exhaustive. We invite special attention to the latter, which was prepared with skill and patience by a profound student of the law, William Meade Fletcher, the author of the authoritative and encyclopedic textbook, Fletcher on *Corporations.*

It is true, as appellant justly states in its brief in opposition to appellee's Motion to Dimiss or Affirm, that the merits of this case have already been discussed in the re-

spective statements of the parties; that is to say, in our Statement Opposing Jurisdiction and our Motion to Dismiss or Affirm, on the one hand, and at more elaborate length in the appellant's Brief in Opposition to that statement and motion.

In view of this fact the appellee requests that the Court consider his Statement Opposing Jurisdiction and his Motion to Dismiss or Affirm as a part of this brief on the merits; it is not our intention here to repeat what has there already been said, except so far as may be necessary for the sake of connection.

Appellee's Objections to the Statement of the Federal Question as Made by the Appellant on Page Three of Its Brief.

We take serious exception to the form and method in which the appellant has undertaken on page 3 of its brief to state the Federal constitutional question here involved. Our objection to the question as there stated goes not only to inaccuracies in detail but to the entire form and approach.

The delegation is there said to be to an "*individual*" administrative officer; that this individual officer is empowered to determine that a certain crossing is to be eliminated; and further that he is to determine without notice of hearing *the manner* in which it should be eliminated, namely, *by a highway overpass*. The question as stated by our opponents further refers to the determination by this individual as "*personal*" as well as "*ex parte*." We do not at all concur in these statements.

The appellee respectfully submits that our opponents' method of stating the question fails to take into account several considerations to which we have already called

attention and to which other references will be made hereafter, namely:

(1) No allusion is made to the legislative policy of the Commonwealth of Virginia against grade crossings which was adopted some thirty years ago and declares in terms that the policy of Virginia is to eliminate all grade crossings wherever reasonably practicable. This policy is referred to in the decision of the Supreme Court of Appeals of Virginia; 167 S. E. Adv. Sh. No. 6, at page 579; Record, 133. All grade crossings are by this legislative policy potentially prohibited; by which we mean that their abolition accords with the Virginia law and the elimination of all would be accomplished except for practical and financial considerations which necessarily render the elimination a slow process, beginning with the most dangerous and inconvenient crossings (especially those on main arteries of traffic) and progressing gradually as times and conditions may warrant with the abolition of others as to the Highway Commissioner may seem best, having regard to the public safety and convenience.

(2) The question as stated by our opponents ignores the fact that the delegation of administrative discretion is not to an individual in his personal capacity, as our opponents say or intimate, but the discretion delegated is to *a Department of the State Government;* an arm of the Commonwealth, as the opinion of the Corporation Commission phrases it; an administrative department of the State, as the decision of the Supreme Court of Appeals of Virginia puts it. This consideration is not only ignored in the statement of the question by our opponents but they improperly designate the Highway Commissioner as *an individual* and his opinion on the question as his *personal* opinion. Further on in their brief, at page 18, they become more

rhetorical and refer to his opinion as "*arbitrary*" and "*purely personal*" and his action as an "*arbitrary fiat.*"

(3) Opponents' statement of the question wholly ignores the fact that the delegated discretion is to be exercised under a legislative guide or standard expressly laid down in the statute as a basis for the official action of the Highway Department. Under this statute there is to be nothing arbitrary or personal about the discretion delegated; on the contrary, it is to be exercised officially, and the public safety and convenience is laid down as the test, guide or standard under which the delegated discretion is to be exercised.

(4) The question as stated by our opponents ignores also the provisions of Section 164 of the Constitution of Virginia prescribing that the right of the Commonwealth, *through such instrumentalities as it may select,* to define the public duties of common carriers, shall never be abridged. This section of the Virginia Constitution is cited and quoted on page 582 of the published decision of the Supreme Court of Appeals of Virginia; Record 140.

(5) Appellant's statement of the question also ignores the consideration that the right of the railroad to propel its trains at high speed over public highways at grade is not a common or ordinary right such as is inherent in all citizens, but is a special privilege conferred by the Commonwealth *ex gratia.* Our opponents suggest the erroneous idea that the Commonwealth of Virginia desires to treat railroads as *caput lupinum,* whereas the simple fact is that the Commonwealth has elected, under a legislative policy long established, to take back from the railroads, gradually and as conditions may warrant and the public safety and convenience may require, a special and extraordinary privilege which they have heretofore enjoyed, partaking in no way of the nature of an inherent right.

Having regard to the foregoing considerations in the background, we shall now endeavor to make a restatement of the Federal constitutional question here involved:

The Federal Constitutional Question Restated.

Bearing in mind the provisions of Virginia Constitution Section 164, and the legislative policy of Virginia against railroad-highway grade crossings, which were originally permitted and now exist not by inherent right but by special privilege—is a statute violative of the due process clause of the Fourteenth Amendment because, in the exercise of the police power, it delegates to an administrative department of the Commonwealth, when in the official opinion of that department the public safety and convenience require the elimination of a particular grade crossing, discretion and power to ascertain such state of facts and direct the elimination of such grade crossing, at the equal cost of the railroad and the Commonwealth, without notice to the railroad or an opportunity to be heard on the point; the design and manner of elimination, and the method and details of construction, having regard to the cost, however, being the subject of a judicial hearing expressly provided for after due notice, if the department and the railroad are unable to agree on these points?

The Two Branches of Appellant's Attack.

We have stated the two branches of the appellant's attack upon this statute on pages two and three of our Statement Opposing Jurisdiction, the first being that legislative powers of this character cannot be delegated, and the second, that no provision is made for notice and a hearing.

On the question of the propriety of the delegation we think it plain, in view of the authorities there cited by us, that no Federal question is involved. If the Commonwealth of Virginia has the right through any branch of its government, by any exertion of its sovereign power, to order the abolition of a grade crossing, then, from the standpoint of

the Federal Constitution, it is wholly immaterial whether this be done by direct legislative enactment or by delegation to an subordinate board. The right to delegate is not only reserved by Section 164 of the Constitution of Virginia, but the absence of any Federal question in this regard is plainly shown by the quotations from two decisions of this Court we cited, namely:

Prentis v. *A. C. L.*, 211 U. S. 210, 225;
Erie R. R. Co. v. *Public Utilities Commrs.*, 254 U. S. 394, 413.

Upon the second point of attack, namely: That no provision is made for notice and a hearing, we again refer the Court to our Statement Opposing Jurisdiction, pages 5 to 8.

Appellant's Significant Admission.

The admission by the appellant, to which we refer on page 5, that the *legislature* of the Commonwealth could make a *direct* determination to eliminate a grade crossing without notice or an opportunity to be heard, is significant and pertinent. As we there stated, the admission was made throughout the briefs below, and is referred to in the opinions both of the Corporation Commission and of the Supreme Court of Appeals of Virginia. We note with interest that the admission is now again made in appellant's brief in this Court; see especially the paragraph at the bottom of page 5 of appellant's brief, and again in connection with the strained effort on page 36 to distinguish the case of *Health Department* v. *Trinity Church*, 145 N. Y. 32.

If the Commonwealth of Virginia can through any instrumentality or by any means without notice or a hearing decree the elimination of a grade crossing,—if the Commonwealth can in the exercise of the police power in the interest of public safety exert this pressure upon the railroad without affording it notice and a hearing,—then it is

difficult for us to understand how any Federal question is injected by reason of the fact that the Commonwealth has adopted what to it seems the most convenient method of exerting the police power, without notice or a hearing. The rights of the Commonwealth under the police power cannot rise above the Federal Constitution. There must be a direct substantial relation between the public welfare and the regulation sought to be enforced. And the means adopted to procure this must be reasonable and not confiscatory.

If the above requirements are met it is no concern of the Federal Government, no matter of constitutional law under the Federal constitution, just *how* the regulation is made operative, whether by direct legislation or by delegation.

If the Commonwealth of Virginia can under the Federal Constitution in any fashion order the elimination of a grade crossing without notice and a hearing, then it is certainly at liberty to accomplish this in any form or manner which to it may seem best suited to the circumstances without impinging upon the inhibitions of the Federal Constitution.

The admission of our opponents thus repeatedly made that the Commonwealth of Virginia could accomplish this result by direct legislation of its General Assembly, is an admission that there is nothing in the Federal Constitution to prohibit such procedure. And this for the reason that if the Fourteenth Amendment of the United States Constitution does in fact require notice and a hearing as a part of due process of law in this class of cases, then it is required as much of the General Assembly of Virginia as it is required of any other instrumentality of the Commonwealth.

It has always appealed to us as a necessary corollary of this admission of the appellant, which the direct authorities

have compelled it to make, that no question under the Federal Constitution is or can be left in the case. The admission is tantamount to saying that there is no Federal question here, and the appellant's case must fall.

Enforcement of a Police Regulation Involves no Taking of Property.

We have pointed out in our Statement Opposing Jurisdiction and in our Motion to Dismiss or Affirm that this is a mere police regulation and does not involve the *taking* of any property, reference being made to the opinion of the Supreme Court of Appeals of Virginia and the authorities cited, Record 141. The authorities are cited on pages 8 and 9 of our Statement Opposing Jurisdiction and will be found elaborated in the opinion of the Corporation Commission in this case on pages 52 *et seq* of the Record.

It is respectfully submitted that the legal principles to be applied in determining whether or not the requirements of due process, or the law of the land, have been met can hardly be better or more simply stated, than in Cooley's Const. Lim. (8th Ed.), pages 740, 741:

> "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. * * * *When the government through its established agencies interferes* with the title to one's property, *or with his independent enjoyment of it* and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the

> legislature interferes to give direction to its title through remedial statutes, *different considerations from those which regard the controversies between man and man must prevail,* different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. DUE PROCESS OF LAW IN EACH PARTICULAR CASE MEANS, SUCH AN EXERTION OF THE POWERS OF GOVERNMENT AS THE SETTLED MAXIMS OF LAW PERMIT AND SANCTION, AND UNDER SUCH SAFEGUARDS FOR THE PROTECTION OF INDIVIDUAL RIGHTS AS THOSE MAXIMS PRESCRIBE FOR THE CLASS OF CASES TO WHICH THE ONE IN QUESTION BELONGS." (Italics and capitals supplied.)

We say there is a vast difference between what is required for the due process of law in ordinary cases between man and man and in proceedings where the Government itself through any of its agencies is exerting the police power. This point is adequately discussed in the opinion of the Corporation Commission beginning on page 63 of the record and it would serve no good purpose to repeat the analysis and the quotations in this brief. We will content ourselves with a reference to that opinion.

The Legislative Policy and Guide.

Though we submit that the point is not pertinent to the incidence of the Fourteenth Amendment of the United States Constitution, yet it should be pointed out in this case that there has been no delegation of any personal or arbitrary power to an individual without legislative guide. The delegation is to a state department. The delegation confers power to determine officially a state of facts, upon the ascertainment of which the operation of the established policy and law of the Commonwealth of Virginia depends. The discretion is to be exercised under the express terms of the statute in accordance with a legislative guide or standard there set up, namely: the requirements of public

safety and convenience. It is true that this legislative guide is expressed in general terms. It is also true that the laying down of a legislative guide in general terms is quite sufficient to prevent the discretion from being characterized as personal or arbitrary.

The distinction between arbitrary discretion and discretion under legislative guide is strikingly brought out in the case of *Thompson* v. *Smith*, 155 Va. 367. The question in that case was the constitutionality of an ordinance in the City of Lynchburg which undertook to delegate to the chief of police power to issue a permit to drive automobiles to persons over sixteen years of age who upon examination could demonstrate ability and knowledge to qualify them "in the judgment of the chief of police." The ordinance also authorized the chief of police to revoke the permit of any driver "who in his opinion becomes unfit to drive an automobile." It will be observed that *quoad* the granting of the permit there was a very general legislative guide or standard under which the chief of police was directed to act, but in the provision of the ordinance concerning the revoking of permits there was no legislative standard whatever.

The Court, after an elaborate discussion of what powers could and what powers could not be delegated, says on page 383:

> "The ordinance here in question declares the policy of the law and fixes the legal principles which are to control the chief of police in *granting* a driving permit. The applicant must demonstrate his ability to safely and properly operate motor vehicles upon the streets of the city, and demonstrate that he knows the traffic laws of the State and the city, and shall be sixteen years of age or over. While the ordinance provides that no permit shall be issued to the applicant unless his examination by the chief of police shall disclose that he possesses such ability and knowledge '*as in the judgment* of the chief of police qualifies such person to re-

ceive such permit,' the discretion here vested in the chief of police is *essentially ministerial and not legislative.*

"But when we come to examine the provisions with reference to *revocation* of permits by the chief of police the policy of the law and the legal principles which are to control the action of the chief of police are not determined or determinable from the terms of the ordinance." (Italics supplied.)

So also in the case of *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, the point was whether a statute of Ohio was constitutional. The statute was attacked because it denied due process of law in that it attempted to delegate legislative power to a board of censors without prescribing a standard to be followed and without providing for a judicial determination.

This statute provided that the board of censors should examine motion picture films and that "only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board" (236 U. S. at page 240):

It will be observed how general is the legislative guide or standard laid down under which the board of censors was to act; yet said the Court, in the opinion by Mr. Justice McKenna, at pages 245 and 246:

"The next contention of complainant is that the Ohio statute is a delegation of legislative power and void for that if not for the other reasons charges against it; which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in

given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

"The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprise; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal education' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite *Gundling* v. *Chicago*, 177 U. S. 183; *Red 'C' Oil Manufacturing Co.* v. *North Carolina*, 222 U. S. 380; *Bridge Co.* v. *United States*, 216 U. S. 177; *Buttfield* v. *Stranahan*, 192 U. S. 470. See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

"To sustain the attack upon the statute as a delegation of legislative power, complainant cites *Harmon* v. *State*, 66 Ohio St. 249. In that case a statute of the State committing to a certain officer the duty of issuing a license to one desiring to act as an egnineer if 'found

trustworthy and competent', was declared invalid because, as the court said, no standard was furnished by the General Assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was 'left to the opinion, finding and caprice of the examiner.' The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law 'is perfect, final and decisive in all of its parts, and the discretion given only relates to its execution.' Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority but which exhibit the juridical sense of the State as to the delegation of powers."

We submit that the legislative guide or standard laid down in the Lynchburg ordinance in the *Thompson case, supra,* and that laid down in the Ohio statute in the *Mutual Film case, supra,* were not in any respect more specific or detailed than the legislative guide and standard laid down in the Virginia statute here under attack. In all three cases the standard was expressed in very general terms but the policy of the law and the legislative intent is plainly and sufficiently expressed.

Our opponents on page 35 of their brief in opposition to our motion to dismiss or affirm, say that the case of *Chi., M. & St. P. R. Co.* v. *Board of Railroad Commrs.,* 76 Mont. 305, 347 Pac. 162, is very interesting and that in that case the Montana Court held unconstitutional "an entirely analogous statute." We submit that there is no similarity in the case and no analogy in the statute involved. The case concerned additional trackage and involved a *taking* of property. The statute in the Montana case delegated arbitrary discretion without any suggestion of legislative guide. The opinion of the Montana Court itself emphatically points

out the clear distinction between that case and the instant case when it uses the following language:

> "The statute does not undertake, *even in the most general terms*, to prescribe conditions under which the board may compel the carrier to construct a spur. *It does not provide* that the board may issue its order *when reasonable public necessity requires it; there is no indicated rule or decision.*"
>
> "The board's order to the carrier to construct the spur track is in effect *a taking of property.*" (Italics supplied.)

Discussion of Grade Crossing Elimination Cases.

We have on pages 18 and 19 of our Statement Opposing Jurisdiction and Motion to Dismiss or Affirm cited without comment the grade crossing cases which have been passed on by this Court. We shall now undertake to point out in more detail the bearing of these cases upon the instant case and endeavor to show that argument by analogy is not necessary here, and this for the reason that principles and doctrines long settled by the decisions *in this particular class of cases* are determinative of the instant case and if applied will require an affirmance of the decision of the Supreme Court of Appeals of Virginia.

The first of such cases to which our attention has been called reached this Court in the year 1894, and has been later referred to as one in which the subject was elaborately considered:

New York, &c., Rwy. Co. v. *Bristol*, 151 U. S. 556.

A Connecticut statute enacted in 1889 delegated to railroad commissioners power to eliminate grade crossings at the sole expense of the railroads. Acting under this statute the commissioners directed the elimination of a certain grade crossing in the town of Bristol.

It was urged among other things that this amounted to taking the property of the railroad without due process of law, to which reply was made that the right to amend the charter of the railroad was reserved by the State and that the railroad had had a hearing. To this it was said by counsel on behalf of the railroad (151 U. S. at page 564):

> "But before the hearings began at all, it was settled by the prejudgment of this extraordinary board of three men, that this particular one among the more dangerous crossings was the one to be removed and, as a necessary consequence under the law, that no matter how much of the danger at the crossing is created by the condition of the adjoining highways for which the town of Bristol is alone responsible,—no matter even, if, on investigation, it could be shown that in this case the railroad company is not responsible for any of the danger at the crossing, nevertheless, the railroad company is to pay for the whole work ordered."

The only questions on which there had been a hearing were how and in what manner the highway should be carried over or under the railroad, and whether the railroad's financial ability warranted the requirement. The foregoing from the contention of counsel for the railroad is very apt to the instant case. For here also appellant takes the position that the railroad is entitled to notice and a hearing on the question whether or not the particular grade crossing shall be eliminated.

It appears also in that case that the railroad was required to do work entirely outside of the limits of its own right-of-way in order to make comfortable grades. This is not true in the instant case. Counsel for the railroad concluded with a contention almost identical with appellant's contention here (151 U. S. at page 565):

> "It seems to the plaintiff that, when it is denied a hearing as to all the matters of primary importance, it

> is a hollow mockery to talk about its having its day in court, because it is allowed to be heard on a question so narrowed as merely to mean whether it can get money to pay this bill, or because its engineers are allowed to suggest modifications of the plans presented, so as to obviate the ordering of impracticable railroad construction."

So much for the contentions of the railroad. To elaborate the pertinency to the instant case would be to labor the obvious.

The unanimous opinion of the Court was rendered by Chief Justice Fuller. It overruled all the objections and contentions of the railroad, and held the Connecticut statute constitutional and the acts of the railroad commissioners thereunder valid. The constitutional point had not been made originally but was brought in by amendment of the errors assigned, as to which this Court said (p. 565):

> "This tardiness in bringing the contention forward is perhaps not to be wondered at in view of the repeated adjudications of the Supreme Court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation."

The following passages are quoted from the opinion, on the pages indicated:

> "It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the State * * *" (page 566).
>
> "* * * That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue * * *.
>
> "It is likewise thoroughly established in this Court that the inhibitions of the Constitution of the United

States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, *are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.* The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied inability to governmental regulation in particulars essential to the preservation of the community from injury" (page 567).

"The objection is not that hearing was not required and accorded, which it could not well be in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and *that the particular crossing to be removed was authorized to be prejudged.*" (Italics supplied.) (Pages 568-9.)

The conclusions of the Court were as follows:

"The conclusions of this Court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal or governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no injust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interests, in the exercise of legislative discretion; or are they thereby deprived of property without

due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. (Citing cases.)" (Italics supplied.) (Page 571.)

It will be seen therefore that in this early case the constitutionality of the statute was unsuccessfully attacked on both grounds urged at this late day in the demurrer in the instant case.

The appellant is confronted with the judicially recognized danger incident to grade crossings. This is a matter of common knowledge, and courts even in the absence of legislation will recognize that such crossings are always a menace to public safety. This is especially true when the highway involved is a main artery of traffic. The direct relation between the police regulation and the public safety and welfare is obvious. We do not have to stretch the imagination to find that direct and pertinent bearing which such regulations must have to the safety of the public. Many police regulations have been upheld where this connection, which is essential to the validity of all police measures, has been tenuous, if, indeed, we may say fanciful. Defendant can make no such contention here, the relationship being direct and immediate, plain and obvious.

That the expense is out of all reasonable proportion to the anticipated public benefit will be difficult if not impossible to establish, in view of the fact that the State itself will bear its full one-half share of such expense. This being so, heavy indeed will be the burden of the appellant to show that there is anything unreasonable or arbitrary in the requirement that the grade crossing be eliminated. The State

is not requiring the railroad to use its funds alone in order to accomplish some fanciful public good. The good faith of the State and of the Highway Commissioner is vouched for by the fact that the State itself shares the cost, dollar for dollar, with the railroad.

In the same year (1894) we find an interesting annotation appended to the report of the case of *Kelly* v. *Minnesota* (Minn.) 26 L. R. A. 92, under the title: "*Liability for cost of changing grade or street to prevent the crossing of a railroad at grade.*"

This note is interesting as indicating some of the earlier conceptions of the basis in law justifying the elimination of grade crossings at the expense, total or partial, of the railroads, and the growth of judicial ideas upon the subject, paralleling the expansion of the police power.

The annotator states at the outset that the power of the legislature in this respect seems to be absolute, *in the absence of some charter contract.* It is now well recognized that no charter contract can interfere with the exercise of the police power, that the State or municipality cannot by contract or in any other manner divest itself of any part of its police power.

The annotator also intimates that there is or may be a difference between eliminating an *existing* crossing and requiring separation of grades *at the time of the construction* of the railroad; he says that where a new street is opened across an existing railroad the grades must be separated at the expense of the municipality. The distinction between proposed and existing grade crossings no longer exists. It is now clear that the municipality would not have to bear the expense of carrying the new highway over the railroad.

The annotator also refers to the reserved power in the State to amend a railroad charter, which was then supposed to have some bearing upon these questions. No such basis of regulation is now required or even deemed pertinent.

These suggested bases of governmental power, and these distinctions as to when and how such power may be exercised, are now recognized to be aside from the mark. The power of the State, either directly or through its boards and commissions, to require the elimination of grade crossings at the expense of the railroads is now recognized to be simply an exercise of the police power, inherent in sovereignty—a power which the sovereign itself cannot abdicate or limit. Nowadays the only open questions are: *First.* Is there a real connection between the proposed change and the public safety or welfare? *Second.* Is the requirement so arbitrary, unreasonable and out of all proportion to the good to be accomplished that the regulation amounts to confiscation?

The connection between eliminating a grade crossing and the public safety is manifest and obvious. The courts take judicial notice of this menace and the policy of the Commonwealth was announced by the General Assembly a generation ago and has long been recognized by the courts. So the first question passes out of the picture where a grade crossing is concerned.

This being so, the second question likewise passes out of the picture in the instant case—if not for good and all, certainly so far as the demurrer is concerned.

Chicago, &c., Rwy. Co. v. *Nebraska*, 47 Neb. 549, 41 L. R. A. 481.

In the year 1896 the Supreme Court of Nebraska decided this grade crossing case and upon its affirmance by the Supreme Court of the United States it has become a leading authority in settling important principles of constitutional law.

The City of Omaha by ordinance required the railroad to repair a certain portion of a viaduct at its own expense.

The most important objection made by the railroad (so stated on page 484 of the L. R. A. report) was that the ordinance took the property of the railroad without due process of law and impaired the obligation of the contract with the city under which the track was laid and the viaduct constructed.

The court held that the purpose of the legislation—that is to say, the general State law under which the ordinance was enacted—was "to promote the convenience and safety of the public at a grade crossing, *which is judically recognized as a place of danger.*" The question was whether there was a legitimate exercise of the police power of the State.

The railroad *claimed* that the proceeding by the mayor and council which determined the necessity of repairing the viaduct was "essentially judicial in character" (page 484 of the L. R. A. report). And the railroad also *claimed* that "such a proceeding, *without notice* to those concerned, and *without giving them an opportunity to be heard,* violates every maxim and principle of constitutional government."

But the court held:

> "The doctrine is now firmly established, although after some diversity of opinion, that previous notice, and an opportunity to be heard, by persons thereby affected, is not indispensable to a valid exercise of the police power" (page 484 of the L. R. A. Report).

In support of this doctrine, the court cites and quotes from *Woodruff* v. *Catlin,* 54 Conn. 295, which was a case of separating the grades of two railroads at an intersection, at the expense of the railroads; the court held that the State had power to require such separation and that the power could be exercised "through the instrumentality of a commission."

The court also cited *New York, &c., Appeal,* 58 Conn. 532, where a similar discretion had been delegated to *a commissioner:*

> "This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger; and does it in the same manner, and *through the same instrumentality,* that it provides and maintains highways through, and at the expense of, the towns and other corporations * * * railroad companies, in some sense, are but the agents of government, in affording to the public a more expeditious and vastly improved method of travel * * *. They contribute largely to the danger, and the State may well require them to contribute largely to its removal."

The same doctrine was re-asserted by the same court in 62 Conn. 527, and affirmed by the Supreme Court of the United States.

Also *Train* v. *Boston, &c. Co.,* 144 Mass. 529; 59 Am. Rep. 115; which upheld a regulation of a board of health, passed by delegated authority, requiring disinfecting in certain cases at the owner's expense, without any opportunity for a hearing or for any review in the courts.

Also *Commonwealth* v. *Roberts,* 115 Mass. 281; 16 L. R. A. 400, upholding a similar regulation requiring sewer connection, there being no provision for notice, hearing or appeal.

Also *State* v. *Missouri, &c., Co.,* 33 Kan. 176, where the court held that no advance notice was necessary, saying:

> "Notice afterwards, with an opportunity on the part of the railroad companies to contest the validity of ordinance, and the right of the city to compel them to construct the viaduct, is sufficient."

Also the leading case of *New York Health Department* v. *Trinity Church,* 145 N. Y. 32, 27 L. R. A. 710. The court

referred to this case as "the clearest and most satisfactory exposition of the subject." This New York case is cited and quoted at length in the opinion of the Corporation Commission in the instant case on page 73 of the record, and we submit that it furnishes a complete answer to both points of objection made by appellant.

This leading Nebraska case, holding that powers of this kind are inherent in the sovereignty of the State and may be asserted either by the legislature directly or by delegation to other agencies, without notice or any opportunity to be heard, was affirmed and the doctrine fully approved by the Supreme Court of the United States in the year 1898 under the style and citation:

Chicago, B. & Q. R. Co. v. *Nebraska*, 170 U. S. 57.

The Supreme Court of the United States held that Federal questions were involved, and it being asserted that the obligation of a contract was impaired, it was the province and duty of this Court to determine for itself whether or not such contract existed.

The court was of opinion that the viaduct was constructed pursuant to a certain contract, but that all such contracts, where the safety and welfare of the public are involved, are subject to change by subsequent legislation; that the State could not divest itself of its police power by contract or otherwise; and that the repair or alteration of the viaduct at the expense of the railroad company could be directed by the State through the instrumentality of the city council.

The opinion was delivered by Mr. Justice Shiras and the decision of the highest court of Nebraska, which we have considered at length, was affirmed.

This Court there pointed out the distinction between ordinary contracts between private persons and contracts

made with railroad companies—"where the subject-matter of the contract is one which affects the safety and welfare of the public." As to such public contracts this Court said:

> "The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

The opinion cites with approval the cases cited by the Nebraska Court. *New York, &c.*, v. *Bristol*, 151 U. S. 556, is referred to as a case in which "the subject was elaborately considered."

The court plainly says that in determining to repair the viaduct the city council was exercising a legally delegated discretion and was not acting *in a judicial manner*. The delegation by the legislature to the city council as an instrumentality was not a direction "*to proceed judicially but to exercise a legally delegated discretion*" (170 U. S., p. 76).

Specifically on the point of notice and an opportunity to be hear, the Supreme Court approved the doctrine announced in *State* v. *Missouri, &c., Railroad*, 33 Kan. 176, and *New York Health Department* v. *Trinity Church*, 145 N. Y. 32, quoting the passage we quoted on page 8 of our Statement Opposing Jurisdiction and stating the decision in the *Trinity Church Case* as follows (italics supplied):

> "*Health Department* v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, *whenever so directed by the board of health. The statute made no provision for notice* to property holders, and none in fact was given, while it was admitted that it would cost the re-

spondent a considerable sum of money to comply with the order of the board."

The United States Supreme Court quotes from the *Trinity Church Case* as follows:

> "The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety *without providing that the parties who are to be affected by those laws shall first be heard* before they shall take effect in a particular case * * *. *The fact that the legislature has chosen to delegate a certain portion of its power to the board of health* * * * would not *alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing* to the owner before it made such order * * * laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. *They do not appropriate private property for public use*, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." (Italics supplied.)

In concluding the opinion in the *Nebraska Case*, Mr. Justice Shiras says that previous notice to the railroad companies was not necessary nor was it necessary that they be invited to participate in the consideration of the proposed change.

Whether or not grade crossings are inherently dangerous in the present state of traffic development is not a judicial matter. The decision to eliminate them when in the opinion of the State Highway Commissioner the public safety or convenience requires, is the announced legislative policy of the Commonwealth of Virginia. All are under the potential

ban of the statute. It being impracticable to abolish all at once, a discretion is delegated to an appropriate public official to determine *when* each particular crossing is to be eliminated, under the guide and by application of the standard laid down by the Virginia statute here under attack. The determination is merely a part of the general police power exercised through the instrumentality of an administrative officer.

This determination is not subject to review by the courts. *If a review were provided for before the courts, the courts in reviewing the decision of the Highway Commissioner would still be acting, not judicially, but in an administrative or ministerial capacity.* This is plainly pointed out in *Thompson* v. *Smith*, 155 Va. 367, as well as by the State Corporation Commission in its opinion in the instant case at page 129 of the record.

Under the Virginia statute the elimination is to be accomplished upon terms more than usually generous to the railroads, for the State bears its full one-half of the entire cost of the work. The railroad is accorded a full opportunity to be heard in the matter of the nature of the proposed new crossing and the details of the plans and specifications. These matters are under the supervision of the State Corporation Commission. So to the natural safeguard against extravagance afforded by the fact that one-half of the expense is to be borne by the State (a very practical and effective protection in itself), the General Assembly has added the supervision of the plans by the Corporation Commission, leaving to it the duty of seeing that no unnecessary work is done and that no unduly elaborate and expensive design is adopted, thus protecting the railroad from disproportionate, unreasonable or arbitrary expenditures.

The following expression from *Missouri &c. R. Co.* v. *May*, 194 U. S. 267, is quoted in the opinion of the Supreme

Court of Appeals of Virginia in the instant case on page 582 (167 S. E. Adv. Shs. No. 6) and is deemed worthy of repetition:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it *must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.*" (Italics supplied.)

In 1921 the railroads again brought their same objections against grade crossing eliminations before the United States courts, and added the alleged burden on interstate commerce. This was in the case of

Erie Railway Co. v. *Commissioners*, 254 U. S. 394.

The Board of Public Utilities Commissioners of New Jersey directed the elimination of fifteen grade crossings. The railroads contended that the order imposed a burden on interstate commerce; that it was wholly unreasonable and arbitrary and therefore violated the due process clause; and that the statute conferred on the Board arbitrary power. The railroads admitted (page 400) that every grade crossing "in the very nature of things is to some extent dangerous to public safety and to some extent impedes public travel."

And on page 406 the following contention on behalf of the railroads is set forth:

> "If an administrative body is given power to determine as a matter of fact what constitutes danger or impediment, and if its conclusion in that respect is binding on the reviewing court, except in a case where there is no evidence whatever to sustain it, then there is no limit to what might be ordered under such a statute, other than the sound discretion of the administrative body to whom is committed this vast power."

The opinion of the court was delivered by Mr. Justice Holmes, who remarks that the elimination of grade crossings is one of the most obvious cases of the exercise of the police power, and says:

> "It is said that if the same requirment were made for the other crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights" (page 410).

On page 412 the opinion states in regard to grade crossings, that "*the situation is one that always is dangerous, and that the Board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses.*"

Also, on the same page:

> "The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil."

In answer to the objection that the statute left a discretion to the board, this Court makes this most significant statement on pages 412 and 413:

> "Some argument is based upon a discretion supposed to be left to the Board by the statute, which reads that when it appears to the Board that the crossing is dangerous it may order, &c. The State courts seem to regard the words as imposing a positive duty, but upon either construction we perceive no infraction of the company's constitutional rights. If the words are imperative the reasons that we have given apply. If they leave a discretion it is subject to review by the courts, *and this Court has no concern with the question how far legislative or quasi-legislative powers may be delegated to a commission or board.*" (Italics supplied.)

This means, in short, that on the point of propriety of delegation of discretion to boards or officers *the Federal courts are not concerned;* if the power exists in any department of the State to do what has been done as it has been done, then the means by which it is accomplished does not involve any Federal question.

And on this point see also *Bragg* v. *Weaver*, 251 U. S. 57, 58.

It will be noted that this opinion in the *Erie case* upholds the statute and the order of the Board upon the broad ground that *it is an exercise of the legislative police power delegated by the State to the Board.* The case answers the contention of the appellant in its demurrer in the instant case, both on the point of delegation of power and on the point of the lack of notice. It is well recognized that no notice is required to justify a legislative exercise of the police power. That this is true of a direct legislative exercise is admitted even by our opponents, to which admission we have already adverted. That there is no difference in this respect between direct and delegated exercise is shown by the authorities cited in the opinions below, in our Statement Opposing Jurisdiction, and in this brief.

Durham v. *Southern R. Co.*, 185 N. C. 240, 35 A. L. R. 1313 (affirmed 266 U. S. 178).

The City of Durham required the railroad to eliminate a grade crossing and to build an underpass. The railroad took the position that an overhead bridge would be more economical than an underpass and that the requirement of the city was unreasonable and expensive as well as a burden upon interstate commerce; also that the ordinance was arbitrary and did not afford due process of law. The railroad urged also that the danger at the crossing, and the

blocking of the crossing by trains, and the necessity for the abolition of the crossing were all issues of fact upon which the railroad was entitled to a jury trial under the North Carolina statute.

In the opinion of Chief Justice Clark it was held that *no issues of fact were raised.* Courts will not interfere with the statutory discretionary powers given to the governing authorities of a town, unless their action is so unreasonable as to be an oppressive and manifest abuse of the discretion, amounting to confiscation.

It was there said that the city's *prima facie* case was made out when it showed the enactment of the ordinance; a presumption arose in favor of the validity of the ordinance and the burden was upon the railroad to show otherwise. The same *prima facie case,* the same presumption, and the same burden, obtain in the instant case. How is it possible to meet such a case, overcome such a presumption, or sustain such a burden by interposing a demurrer?

As the North Carolina court says, on page 1318 of the A. L. R. report:

> "The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court. * * *
>
> "There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressivee before it can become an issue of fact for the jury."

This North Carolina case was affirmed by the Supreme Court of the United States; 266 U. S. 178.

Lehigh Valley R. Co. v. *Commissioners,* 278 U. S. 24.

In this recent case the opinion was delivered by Mr. Chief Justice Taft. This Court again asserts the power of a state

to delegate to a board the right to require the elimination of grade crossings at the expense of railroads. There is no interference with interstate commerce by requiring such eliminations. It is not to be supposed that the Interstate Commerce Commission is required to make investigation *"into parochial matters like this."*

New Orleans Public Service v. *New Orleans* (1930), 281 U. S. 682.

In this case the reverse of the requirement was under investigation. Mr. Justice Butler delivered the unanimous opinion of the court, unholding the validity of an ordinance of the City of New Orleans requiring a street railway company to demolish a viaduct and *to construct grade crossings* in the place of it. The ordinance was held not to violate either the contract or the due process clause. The following is from the opinion of this Court (page 696):

> "The ordinance is presumed to be valid and the burden is upon the appellant to show that, having regard to the facts disclosed by the record, removal of the existing viaduct and construction of the crossings are so clearly unreasonable and arbitrary as to amount to the depriving of appellant of its property without due process of law. * * *
>
> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law."

Analogous Discretion in Condemnation.

This concludes the examination of the grade crossing cases.

We now call attention to an interesting analogy to be found in another connection in which a discretion has been committed to the State Highway Commissioner by the Gen-

eral Assembly of Virginia, which discretion he exercises without notice or hearing and upon which his decision is conclusive and subject to no review. It is referred to in the opinion of the State Corporation Commission on page 104 of the Record.

To the State Highway Commissioner power is delegated in condemnation proceedings to determine where a road shall be located and what land shall be condemned to provide such location. The conferring of this power upon this official has been approved by the Court in two cases, namely: *State Highway Commissioner* v. *Kreger,* 128 Va. 203, and *State Highway Commissioner* v. *Yorktown Ice and Storage Corp.,* 152 Va. 559.

We submit that the State Corporation Commission is correct in saying that the analogy between the exercise of that discretion and the exercise of the discretion here involved is very close.

The Virginia Court said in the *Kreger case,* 128 Va. at page 227:

> "*The necessity of expediency of the location is a legislative question,* the decision of which, *without judicial review,* has been *delegated* to the State Highway Commission by the statute which we have under consideration. That a condemnation statute is not invalid merely because it delegates the decision as to location to ministerial agents and forbids any judicial review of their action in such matter is well settled by the authorities." (Citing *Wilburn* v. *Gaines,* 111 Va. 334; and *Lake Bowling Alley* v. *Richmond,* 116 Va. 429). "The principles on which these Virginia decisions rest are so fully set out therein that it is unnecessary for us to re-state them here. We are asked to overrule these decisions on the point under consideration, but we have no disposition to do so. *They are impregnably supported both on principle and by authority, and their holding just mentioned is fully approved by us.*" (Italics supplied.)

The general nature of the authority delegated is the same. Its characteristics are not judicial. It involves in a high degree the exercise of discretion. No judicial review is provided for. No notice in advance or opportunity to be heard is provided for. The arbitrary abuse of such delegated and final power might bear very harshly upon the private citizen and his property rights. The only hearing afforded in that case is upon the compensation to be paid for the property taken; just as in the instant case the only hearing is upon the method of accomplishing the separation of grades, having regard to expense.

The same basis of reasoning which sustains the decision in the *Kreger Case* sustains the 1930 grade crossing Act here attacked. Both cases involve the "delegation" of power by the General Assembly to the State Highway Commissioner; and both involve the exercise of that power by him without notice in advance to the property owner affected and without an opportunity to be heard "on the main point"—that is, in the one case, shall the property be taken? and in the other, shall the crossing be eliminated?

To demonstrate further that this analogy is strikingly pertinent we point out that this Court alluded to delegated discretion of this character as proper and distinguished the legal principles involved from those applicable in a rate making case. Just so we distinguish the rate making cases cited by our opponents, and say that the discretion here delegated under a proper legislative guide is very similar to the discretion delegated in the condemnation cases, exercisable without notice or an opportunity to be heard, final and not subject to review by the courts. In *Chicago, Milwaukee, &c., Ry.* v. *Tompkins*, 176 U. S. 167, 173, upon which our opponents rely, Mr. Justice Brewer says that upon questions of policy the conclusions of a legislature are beyond judicial consideration, and, differentiating principles applicable to rate-making cases, adds:

"* * * A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment respect to rates."

Adkins v. *Children's Hospital*, 261 U. S. 525.

This case is cited and relied on by appellant on pages 22 and 23 of its brief. In an elaborate opinion by Mr. Justice Sutherland an Act of September 19, 1918, appointing a board with power to fix minimum wages for women in the District of Columbia, was held unconstitutional for the reason that it was not a legitimate exercise of the police power. We consider the principles and distinctions there announced so important in the consideration of the instant case as to warrant a somewhat extended comment.

The appellant relies on this case as authority for the proposition that there can be no "legitimate" exercise of the police power by delegation to an administrative officer or board unless due *procedural steps*, consisting of notice and a hearing, are provided for.

Our first comment is that, whatever different views might be entertained as to the bearing of that case upon the instant case, it could not in the most remote way have to do with *procedural* due process. For the court says on page 541 that the procedural steps were enjoined upon the board:

"If it (the board) approve any recommendations it must give public notice of its intention and hold a public hearing at which persons interested will be heard."

So it was not with procedure the court was dealing when it quoted and approved the case of *Lochner* v. *N. Y.*, 198 U. S. 45, in the manner pointed out by appellant at the top of page 23 of its brief.

The case had to do only with *substantive* due process. In the instant case, substantive due process is a *concessum*.

That *the Adkins case* dealt *only* with substantive due process is apparent if the language quoted by appellant be continued as it appears in 261 U. S. at pages 548, 549, 550:

"* * * The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. * * *"

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker."

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may

> labor to earn their living, are mere meddlesome interferences with the rights of the individual and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed."

We submit that the above continuation of the language quoted by appellant shows that it has been altogether misapplied by our opponents in the instant case. It has nothing to do with *procedural* due process. It is one of the landmarks in the wilderness of the law through which is to be traced that elusive and shifting boundary line between proper and improper attempts to exercise the *substantive* police power.

The appellee has never at any time, by "revival" of "the old idea" (if there ever was such) or otherwise, suggested that the police power of a state "is wholly unrestrained by the Fourteenth Amendment." We have repeatedly said that two things, and only two, are required to *afford* due process of law *in compliance with the demands* of the Fourteenth Amendment in order to render the exertion of the police power legitimate:

> 1. There must be a real and direct connection between the regulation and the public safety, health, morals or welfare—substantial and not tenuous or fanciful; and
>
> 2. The regulation must not be so unreasonable and arbitrary, so out of all proportion to the necessities of the situation, as to amount to spoilation or confiscation.

The vice in the Act under consideration in *the Adkins case* was that it did not meet these two requirements. There

was not a direct relation, as a means to an end, nor was the end itself appropriate and legitimate.

And there was another vice that was pertinent there but irrelevant here, namely, there was no legislative standard or guide whatever under which the delegated authority was to be exercised. This was a pertinent point in that case because the Act concerned Federal territory, the District of Columbia. But, as we have so often said, in the instant case the question is not a Federal one, for if Virginia can require the elimination of grade crossings in any fashion whatever, then, so far as the Federal Constitution is concerned, the form and manner of accomplishing the object is immaterial. (See quotations from *Prentis* v. *A. C. L.*, 211 U. S. 210, 225, and *Erie* v. *Pub. Util. Comrs.*, 254 U. S. 394, 413, in our Statement Opposing Jurisdiction pages 4 and 5.)

That these were the vices in the Act involved in the *Adkins case* is clearly shown by the following from the opinion in that case:

> "* * * The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, *no such prevalent connection between the two as* to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is *without reasonable basis.*"
>
> "The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an *arbitrary* payment for a purpose and *upon a basis having no causal connection with his business, or the contract or the work the employee engages to do.*"
>
> "The *standard* furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy." (Italics supplied.)

It so happens that *the Adkins case* also affords a complete answer to the point the appellant makes on pages 26 and 27 of its brief, and seeks to sustain by an elaborate statistical note: that most grade crossing elimination statutes provide for notice in advance and an opportunity to be heard; ergo, such notice and hearing must be a constitutional requirement.

In *the Adkins case* also this Court was asked to consider the fact that there were numerous similar statutes and a great body of opinion favoring such legislation. The terse comment of the Court (261 U. S. 559) is applicable to appellant's point:

> "These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads."

The True Basis of Decision in Health Department v. Trinity Church, 145 N. Y. 32.

We submit that the effort of our opponents on pages 36 to 38 of their brief to break down the effect of the decision in the case of *Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, and its subsequent approval by this Court in *Chicago, Burlington & Quincy Railroad Company* v. *Nebraska*, 170 U. S. 57, 76, 77,—is altogether futile. It is doubtless possible that the *Trinity Church case* might have arisen and been decided in the manner outlined by our opponents,—that is, under the application of the direct legislation of the State of New York rather than under the discretion delegated to the Board of Health. But the fact is that neither the New York Court in its decision in the case, nor the United States Supreme Court in its interpre-

tation of that decision in the case of *Chi. B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57, took the view that the case so arose. This is demonstrated by the following quotation from the opinion of Judge Peckham in the *Trinity Church case*, at page 713 of the 27 L. R. A. report:

> "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. *So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water as directed.* INDEED, THIS ACT DOES CONTAIN SUCH A PROVISION, BUT THE PLAINTIFF HAS NOT PROCEEDED UNDER IT. IF, IN SUCH CASE, THE ENFORCEMENT OF THE DIRECT COMMAND OF THE LEGISLATURE WERE NOT TO BE PRECEDED BY ANY HEARING ON THE PART OF ANY OWNER OF A TENEMENT HOUSE, NO PROVISION OF THE STATE OR FEDERAL CONSTITUTION WOULD BE VIOLATED. *The fact that the legislature has chosen to delegate a certain portion of its power to the board of health*, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, WOULD NOT ALTER THE PRINCIPLE, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out." (Italics and capitals supplied.)

That the case was not interpreted by this Court to have arisen under direct legislation, but under the exercise of the discretion delegated to the board of health, is equally clearly shown by the following from the opinion of Mr.

Justice Shiras in the opinion in the *Chicago, Burlington & Quincy Railroad Co.* v. *Nebraska*, 170 U. S. 57, at page 76:

> "*Health Department* v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, WHENEVER SO DIRECTED BY THE BOARD OF HEALTH. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board." (Capitals supplied.)

Then is quoted by Mr. Justice Shiras that portion of the opinion of Judge Peckham in the Trinity Church case which we have set out above.

It is respectfully submitted that in view of this language of the New York Court in the decision of the case, and by this interpretation plainly placed thereon by this Court, it is idle for our opponents to assert, as they do, that the *Trinity Church case* did not arise and was not decided as arising under the exercise of delegated power; it is idle for them to contend that the *Trinity Church case*, with the stamp of approval of this Court, does not distinctly hold that such discretion may properly be delegated to a board and exercised by that board without affording him upon whom the police regulation impinges, notice and an opportunity to be heard.

However this may be, the admission of appellant that the Commonwealth of Virginia might by direct legislative action eliminate a grade crossing without any notice or opportunity to be heard, is tantamount to an admission that the Commonwealth may accomplish the same result through any other agency without running counter to the requirement of due process of law under the Fourteenth Amendment of the Federal Constitution.

If the power so to act resides anywhere in the sovereignty of the Commonwealth, then it may be exercised by the Commonwealth either by direct legislation or through any subordinate agency it may please. If the power does not reside in the Commonwealth then it cannot be exercised either by the General Assembly of Virginia, or under delegated power by any administrative board or subordinate branch of government. The Fourteenth Amendment in its requirement of due process of law is just as much a restraint upon the General Assembly of Virginia acting directly as it is upon any board to whom it may elect to delegate some portion of its legislative power.

Once admit (as appellant repeatedly does) that the Fourteenth Amendment does not restrain this kind of procedure in this class of cases by the General Assembly, the supreme legislative body of the Commonwealth of Virginia, and it necessarily follows that it does not restrain it when the General Assembly chooses to accomplish the same result by announcing a specific plan and a plain policy, and then delegates to an administrative department discretion, under the legislative guide or standard set up, to ascertain the state of facts upon the existence of which the application of the law is made to depend.

The exercise of the discretion in this case under the legislative guide merely renders the policy potential in the law, as to the particular grade crossing involved, dynamic.

Respectfully submitted,

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CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1933.

Southern Railway Company, Appellant, *vs.* Commonwealth of Virginia at the Relation of H. G. Shirley, State Highway Commissioner of Virginia. } Appeal from the Supreme Court of Appeals of the State of Virginia.

[December 4, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

This appeal questions the validity of Ch. 62, Acts General Assembly of Virginia, 1930; Michie's Code 1930, Sec. 3974a. Pertinent portions are in the margin.* The claim is that enforcement of the Act as construed by the State Supreme Court, would deprive appellant of property without due process of law and thus violate the XIV Amendment.

Purporting to proceed under the challenged chapter, the Highway Commissioner, without prior notice, advised appellant that

*Ch. 62, Acts General Assembly of Virginia 1930, p. 74. (Michie's Code Sec. 3974a).

" . . . Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead. . . crossing becomes, in the opinion of the State Highway Commissioner, necessary for public safety and convenience, . . . the State Highway Commissioner shall notify in writing the railroad company . . . upon which the existing crossing at grade . . . is, . . . stating particularly the point at which . . . the existing grade crossing is to be eliminated . . . and that the public safety or convenience requires that the crossing be made . . . above . . . the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above . . . the tracks of said railroad, . . . and shall submit to said railroad company plans and specifications of the proposed work, . . . It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead . . . crossing, . . . in accordance with the plans and specifications submitted by the State Highway Commissioner, . . . ; provided, however, that if the railroad company be not satisfied with the plans and specifications sub-

in his opinion public safety and convenience required elimination of the grade crossing near Antlers; also, he directed construction there of an overhead passage according to accompanying plans and specifications. Replying, the Company questioned the Commissioner's conclusion upon the facts, denied the validity of the Act, and refused to undertake the work. Thereupon, by petition he asked the State Corporation Commission for an order requiring it to proceed. A demurrer to this questioned the constitutionality of the statute. It especially pointed out that the Commissioner undertook to ordain, without prior notice, and that there was no provision for any review except in respect of the proposed plans for the structure. The Commission overruled the demurrer and directed the Railway to construct the overhead. The Supreme Court construed the statute and approved this action.

As authoritatively interpreted the challenged act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination unless what the Supreme Court denominates "arbitrary" exercise of the granted power can be

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mitted by the State highway commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the State Highway Commissioner be unable in the meantime to agree on plans and specifications, including the grade of the approaches and the point to which the liability of the railroad shall extend, file a petition with the State corporation commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the State Highway Commissioner, or other plans in lieu thereof; and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, remodel, redesign, relocate or replace, as the case may be, the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, within its right of way limits, and the State Highway Commissioner the portion outside of the railroad right of way, unless otherwise mutually agreed upon, in accordance with the plans and specifications approved by the State corporation commission.

"Upon completion of the work, . . . the costs are to be divided between the state and the railroad," etc.

shown. Upon petition, filed within sixty days, the Corporation Commission may consider the proposed plans and approve or modify them, but nothing more. The statute makes no provision for review by any court. But the Supreme Court has declared that a court of equity may give relief under an original bill where "arbitrary" action can be established.

As construed and applied, we think the statute conflicts with the XIV Amendment.

Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington, ex rel. Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 523, 524; *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 345. See *Chicago, Milwaukee & St. Paul Ry. Company* v. *Board Commissioners,* 76 Mont. 305.

If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this Court declared—

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence'."

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota,* 134 U. S. 418, 457, 458, involved an act of the Minnesota legislature, which permitted the Commission finally to fix railway rates without notice. It was challenged because of conflict with the due process clause. This Court said:

> "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; . . . .
>
> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; . . . ."

The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts

with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *Tompkins*, 176 U. S. 167; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Adams* v. *Tanner*, 244 U. S. 590, 594; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 549, 550.

Lawton v. *Steele*, 152 U. S. 133, points out that the right to destroy private property—nuisances &c.—for protection against imminent danger, has long been recognized. Such action does no violence to the XIV Amendment. The principles which control have no present application. Here, the statute itself contemplates material delay; no impending danger demands immediate action. During sixty days the railway may seek modification of the plans proposed.

Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.

Chapter 62 undertakes to empower the Highway Commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection.

Considering the decisions here, it is clear that no such authority as that claimed for the Commissioner could be entrusted to an administrative officer or body under the power to tax, to impose assessments for benefits, to regulate common carriers, to establish drainage districts, or to regulate business. *Turner* v. *Wade*, 254

U. S. 64, 70; *Browning* v. *Hooper,* 269 U. S. 396, 405; *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88; *Embree* v. *Kansas City Road District,* 240 U. S. 242, 247; *Yick Wo* v. *Hopkins,* 118 U. S. 356. Appellee makes no claim to the contrary. He affirms, however, that under the police power the legislature could rightly grant the challenged authority. But, as pointed out above, this is subject to the inhibitions of the XIV Amendment and we think the suggested distinction between it and other powers of the state is unsound.

This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right to a hearing and review by some court. See *Great Northern Ry.* v. *Clara City,* 246 U. S. 434; *Erie R. R. Co.* v. *Public Utilities Commissioners,* 254 U. S. 394; *Lehigh Valley Co.* v. *Board of Commissioners,* 278 U. S. 24.

After affirming appellant's obligation to comply with the Commissioner's order, the court below said—"The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand". But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary". There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before ~~it properly~~ can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1933.

Southern Railway Co., Appellant, *vs.* Virginia *ex rel.* Shirley, State Highway Comr.	Appeal from the Supreme Court of Appeals of the State of Virginia.

[December 4, 1933.]

The Chief Justice, Mr. Justice Stone and Mr. Justice Cardozo dissent upon the ground that there has been a lawful delegation to the State Highway Commissioner of the power to declare the need for the abatement of a nuisance through the elimination of grade crossings dangerous to life and limb; that this power may be exercised without notice or a hearing (*Chicago, B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57, 77), provided adequate opportunity is afforded for review in the event that the power is perverted or abused; and that such opportunity has been given by the statutes of Virginia as construed by its highest court.